Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

No.: 80-78

ANTHONY PROVENZANO, STEPHEN ANDRETTA, and THOMAS ANDRETTA,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. Were the petitioners' Sixth Amendment rights to a fair and impartial jury destroyed because the District Court refused to excuse for cause several prospective jurors who were tainted by pre-trial media coverage; by compelling the petitioners to exhaust their peremptory challenges in an attempt to exclude such individuals; by failing to conduct an in-depth inquiry into the matter and effect of pre-trial publicity; and by denying the non-Provenzano petitioners' motion for severance and change of venue?

2. a) Were the petitioners, Anthony Provenzano and Thomas Andretta, denied their Sixth Amendment right to trial by an impartial jury when one of the jurors who deliberated upon the case, was discovered, while sequestered, smoking marijuana with two alternate jurors at 3 a.m. on a trial day, and the jurors were thereafter assured by the Trial Court that they need not be concerned about the incident, and no hearing was conducted to determine the incident of the jurors' misconduct or its possible effect on their minds?

b) Should not this Court invoke its supervisory power to grant petitioners a new trial as a result of this incident?

c) Did not petitioners' absence from and ignorance of the in-chambers conference at which the issue of juror misconduct was discussed and it was decided to retain the offending juror, violate the rule laid down in *Snyder v. Massachusetts*, 291 U.S. 97 (1934), and deny him due process of law?

d) Did not petitioners' absence from the in-chambers conference violate Rule 43 of the Federal Rules of Criminal Procedure?

3. Did the Circuit Court's adaptation of *United States v. Rosenstein*, 474 F.2d 705 (2d Cir. 1973), which

allowed admissibility of hearsay evidence on a ground not urged by the Government, deprive petitioner Provenzano of due process of law?

4. Is the Racketeer Influence Corrupt Organizations ("RICO") Act (18 U.S.C. § 1961 *et. seq.*) unconstitutional as applied in this case?

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IN THE

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No.:_____

ANTHONY PROVENZANO, STEPHEN ANDRETTA, and THOMAS ANDRETTA,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Anthony Provenzano, Stephen Andretta, and Thomas Andretta jointly pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of conviction against the petitioners by the United States District Court for the District of New Jersey.

Opinions Below

Following the entry of the judgments in the District Court, petitioners appealed to the Court of Appeals. The as yet unreported opinion of the Court of Appeals

may be found in the joint appendix filed with this petition (1a - 41a).[1]

Upon the affirmance by the Court of Appeals of all judgments of conviction, petitioners jointly petitioned the Panel of the Court of Appeals which affirmed their convictions for rehearing and suggestion for rehearing *en banc*. By order dated July 20, 1980, all applications were denied (44a).

On July 2, 1980 the Court of Appeals, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, ordered that as to the petitioner, Stephen Andretta, the certified judgment in lieu of formal mandate herein, be stayed pending the timely filing of this petition with this Court before July 20, 1980, and if such petition is so filed, further continue the stay until final disposition by this Court (43a).[2]

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[1] The following abbreviations are used in this petition: "a" is a reference to petitioners' joint appendix, which is filed with this petition. The appendix also contains the judgment of the United States Court of Appeals for the Third Circuit in lieu of mandate dated May 8, 1980; the order of the United States Court of Appeals for the Third Circuit denying rehearing dated June 20, 1980; the order of the Court of Appeals staying the certified judgment in lieu of formal mandate as to petitioner, Stephen Andretta, dated July 2, 1980; and the relevant statutory provisions involved. "A" is a reference to the 5-volume appendix heretofore submitted to the United States Court of Appeals for the Third Circuit. These volumes, which contain *inter alia* pretrial and trial testimony, pleadings, and exhibits, will be certified to this Court.

[2] The petitioners, Anthony Provenzano and Thomas Andretta, are presently incarcerated and serving their sentence. See _____ F.2d _____ (3d Cir. 1979). The petitioner Provenzano was sentenced to a term of imprisonment of 20 years and fined $20,000. Petitioner Stephen Andretta received a sentence of 10 years and a fine of $15,000. Petitioner Thomas Andretta was sentenced to a term of imprisonment of 20 years and fined $20,000.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Third Circuit was May 8, 1980, which also was the date of entry. A timely petition for rehearing *en banc* was denied on June 20, 1980. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Invoked in the Case

1. The Fifth Amendment to the Constitution of the United States.

2. The Sixth Amendment to the Constitution of the United States.

3. Title 18 U.S.C. §§ 1961, 1962, and 1963. These constitutional and statutory provisions are set forth in petitioners' joint appendix at 45a.

Statement of the Case

A. The Indictment: The Government's Theory of the Case.

This prosecution commenced on February 22, 1979 with the filing of Indictment No. 79-72 in the United States District Court for the District of New Jersey (A. 1, 16-32). In substance, Count I of the prolix indictment charged the petitioner and others with conspiring to violate the RICO Statute (Title 18 U.S.C. § 1962). The indictment alleged that the conspiracy was manifested through a complex scheme in which the defendants and several unindicted co-conspirators accepted money from Seatrain Lines, Inc. (hereinafter referred to as "Seatrain") and its "house trucker," Interocean Services, Inc. (hereinafter referred to as "Interocean") in return for "labor peace" to those organizations, in violation of Title 29 U.S.C. § 186(b). Count II charged the defendants with a substantive violation of the RICO Statute in

that they accepted 42 enumerated payments between May 31, 1970 and December 16, 1974 in return for providing "labor peace" to Seatrain and Interocean up through mid-1974 and thereafter, to Seatrain and its new house carrier, Di-Jub Leasing Corporation (hereinafter referred to as "Di-Jub").

It was the Government's theory that several of the defendants, whom the prosecution believed to be sophisticated labor leaders, formed an unlawful association, in fact, "the enterprise" (Title 18 U.S.C. § 1964), in order to funnel money to themselves through ostensibly legitimate trucking operations.[3] In the indictment and in its opening remarks to the jury, the prosecution divided the conduct alleged in the indictment into two specific time frames. Between 1969 and mid-1974, the Government alleged that the defendants created a corporation called Cargo Truck Leasing (hereinafter referred to as "Cargo"), to furnish independent owner-operators to Interocean. It was the Government's contention that the defendants would ensure themselves illegal income by creating a "ghosting" operation in which Seatrain's house carrier, Interocean, would be billed for owner-operators who were not actually supplied to Interocean. The Government further contended that in mid-1974, after Seatrain decided to phase-out Interocean, the defendants attempted, through a corporation known as Liftvan, to succeed to the interests of Interocean and to continue to over-bill Seatrain. When that attempt failed, they substituted a corporation known as Di-Jub in place and instead of Interocean and then with perfect symmetry, formed a corporation known as FLT Trucking and Leasing, Inc. (hereinafter referred to as "FLT") to provide the same services to Di-Jub as Cargo did for Interocean. This activity, which the

[3] The Government's theory is based upon the alleged unlawful criminal association formed by the defendants. Neither the labor union to which some of them belonged, nor any trucking companies were named as "the enterprise" in the indictment.

Government claimed violated Title 29 U.S.C. § 186(b), formed the pattern of racketeering activity required by § 1962(c) and (d).

Crucial to the prosecution's theory was the fact that Seatrain and its house carriers knew that the true purpose of the ghosting or over-billing was for "labor peace" and actively participated in the payments.

B. The Proof At Trial.

(a) The Prosecution's Case.

Sometime in 1963, following an aborted college career, Ralph Picardo, through the assistance of the Provenzano family, who he claimed were friends of members of his family, secured a job as a truck driver for a Newark-based ice cream company. Concomitantly, he became a member of Local 648 of the International Brotherhood of Teamsters (hereinafter "IBT") (A. 949-951). Shortly thereafter, he left his Newark employment and in 1964, he transferred to Local 560 of the IBT in Union City, New Jersey.[4] There he met Salvatore Briguglio, a union delegate who was to become his close friend, confidante, and mentor (A. 963).[5] Between 1966 and 1969 Picardo became an organizer for Locals 560 and 84 of the Teamsters. According to Picardo, while an "organizer," he, through Salvatore Briguglio, formed an association with Salvatore Briguglio, his brother, Gabe Briguglio, Anthony Provenzano, Armand Faugno, and Thomas and Stephen Andretta to conduct various unlawful activities. Inasmuch as several members of his association were members of the Teamsters, he, Picardo, acted as their "front man" in these activities while all shared in the profits (A. 960).

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[4] Picardo, an admitted miscreant whose crimes ran the gamut from corrupting juries to murder, was the Government's chief witness.

[5] Salvatore Briguglio, who is named as a co-conspirator, died prior to the filing of the indictment.

Though the petitioner, Anthony Provenzano, had no personal contact with Picardo, according to Picardo, he was the "commander" (A. 982). Salvatore Briguglio, Picardo's silent partner in his trucking business, was second in command, while the Andretta brothers, Armand Faugno, and Gabe Briguglio were on the same and lowest level in the "chain of command" as Picardo (A. 963-964). Picardo also outlined various cliques within the association. Thus, he and the Briguglio brothers formed one faction, Armand Faugno and the Andretta brothers, a second, while the third group (A. 975-981) consisted of the Provenzano family.

After a short tenure as a union organizer, Picardo, at the insistence of his "associates," became involved in managing several trucking companies (A. 985). According to Picardo's tale, the rationale for his apprenticeship in management was to allow him and his 'associates" to glean a profit from both sides of the union-management fence without violating the Taft-Hartley Law (A. 987-988). His initial task under the supervision of Salvatore Briguglio was to monitor the trucking industry to look for a lucrative situation in which the "association" could make a profit in return for supplying "labor peace" (A. 989-990).

Sometime in 1969, Picardo saw an opportunity to use the knowledge he had gained from his years of apprenticeship and observation. A company called Seatrain had created a house trucker without a union contract to do the former's inland trucking. According to Picardo, the situation seemed like a perfect opportunity (A. 993).

Seatrain, a steamship corporation specializing in the transportation of containerized freight, had formed a "house carrier" called "Interocean" to do Seatrain's trucking. Interocean had no union contract even though

it operated in ten states (A. 993-995).[6] Interocean had formed a subsidiary called Switching, Inc., which was unionized and did local switching work (A. 996-997).[7]

Picardo believed that as long as he and his associates could provide labor peace to Interocean, it would be willing to provide him with money (A. 998). In early 1969, Salvatore Briguglio arranged for Ralph Pellecchia ("Raffie"), a member of the "association," to introduce Picardo to Ray Rosen, the then Vice-President of operations for Interocean (A. 999).

According to Picardo, he informed Rosen that if Interocean "use(d) all our drivers," he, Picardo, would provide them with "labor peace" (A. 983). Picardo also told Rosen that by adopting this plan, he would save 30 to 40 percent in expenses and would not have to pay any union pension or welfare benefits. Picardo further maintained that he told Rosen that the fee for providing these valuable services would come from a "ghosting" operation (billing for the use of no-show or fictitious drivers). According to Picardo, Rosen, after consulting with Thomas Durkin, Seatrain's attorney, accepted the plan (A. 1003-1004, 1029-1030, 1040, 1151).

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[6] To support his theory that Seatrain was ripe for an assault, Picardo explained that in 1967 Seatrain contracted its trucking work to a union shop known as John J. Cassale. In 1968, the contract went to Victory Motor Lines. In 1969, a wild-cat strike ensued which became very costly and apparently led to the formation of Interocean (A. 993-994). In fact, Interocean was formed by Seatrain to legally avoid unionization. Similar plans were in use by Sealand Corp. and U.S. Lines, both of whom had house truckers, which utilized non-union owner-operators.

[7] Trucking for shippers involved with containerized cargo generally falls into two categories. First, trucks are needed to haul the containers over-the-road. Between 1970 and mid-1974, Seatrain's over-the-road hauler was Interocean. Second, trucks or "rigs" are needed to move containers within a freight yard. This is referred to as switching. Between 1970-1974, it was performed by Interocean's subsidiary, Switching, Inc. (A. 996-997).

Although Rosen acknowledged that he had met with Picardo at Pellecchia's request "as a man who could supply us with equipment and drivers for the switching operation" (A. 2159), he emphatically denied any knowledge of Picardo's "ghosting" scheme (A. 2212). According to Rosen, Picardo or his company never submitted ghosted or padded bills. Rosen further maintained that Interocean never paid any money to Picardo or "Cargo" for "labor peace" (A. 2217). Moreover, Rosen testified that although Picardo boasted of his connections in the labor movement (A. 2161-2162), Picardo never suggested that he could supply Interocean or Switching with union protection and labor peace for a fee (A. 2295-2296). Rosen's testimony was confirmed by the two dispatchers employed by Interocean, Messrs. Kunze and Heinlein, who admitted receiving bribes from Picardo in return for not revealing his ghosting operation to the officers of Interocean (A. 1853, 1863, 1877, 1881, and 1883).[8]

To implement his plan, Picardo, on March 19, 1970, formed Cargo Truck Leasing Corp. ("Cargo") as the medium through which he would supply drivers to Interocean and Switching and through which he would funnel money to his associates (GX 46, A. 1045-1046). Using friends and newspaper advertisements, Picardo secured approximately 15 owner-operators for use at Interocean or Switching (A. 1044, 1047).

Once his owner-operators were in place, he began to supply them to Interocean primarily for use as switchers (A. 1048). Although he paid the drivers $9.00 per hour, he never paid any pension and welfare benefits (A. 1050-

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[8] Rosen conceded that he, on behalf of Interocean, ghosted switchers with respect to Seatrain. Rosen claimed that his ghosting was in effect a method of assisting Seatrain in violating their tariff rates. Rosen's testimony in this regard was supported by several Seatrain executives.

1051).[9] Picardo maintained that his ghosting scheme was initiated almost immediately and continued until Cargo terminated its relationship with Interocean in 1974. Although he admitted bribing Interocean dispatchers, Messrs. Kunze, Heinlein, and Rotolo, he denied that the purpose of the bribes was to keep them quiet with respect to his ghosting operation. Picardo initially claimed that the bribes were paid to maintain a smooth working relationship (A. 1053-1054). Later, however, he claimed that he paid the bribes so that the dispatchers would not report his operation to the federal authorities (A. 1277). The dispatchers, however, told a very different story. They admitted knowledge of Picardo's scheme and conceded that he bribed them in return for their silence (A. 1853, 1863, 1877, 1881 and 1883).[10] Each of the dispatchers maintained that they never discussed Picardo's ghosting with Rosen or any member of Interocean's management (A. 1866).

George Affsa, Interocean's Vice-President of Finances, testified that sometime in 1974, he determined that Cargo had overcharged Interocean $10,000 to $15,000 (A. 1942-1944, 1961-1962). According to Affsa, he informed Ray Rosen of the overcharge and was told by the latter to charge back Cargo for the apparent overcharge (A. 1945). Affsa complied with Rosen's orders (A. 1945). Affsa, like Rosen and Walter Blanken, Interocean's President from 1970-1972, denied any knowledge of any payments made by Interocean to ensure labor peace (A. 1955-1956).

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[9] There was no evidence that any of the owner-operators used by Picardo were members of any union. On the contrary the proof demonstrated that owner-operators almost never joined the union.

[10] The testimony of the dispatchers was corroborated by Allen Abramowitz, Picardo's then office manager, who testified that the bribes were paid to keep the dispatchers quiet (A. 1853).

Despite the testimony of Interocean's executives that they knew nothing of Picardo's ghosting and despite the concession of Interocean's dispatchers that they had been bribed by Picardo not to reveal his ghosting operations, the Government attempted to prove Seatrain's knowledge by calling several middle-level executives from Seatrain, who sometime in 1971 became aware of a "ghosting" operation.[11]

In any event, as checks began to arrive at Cargo from Interocean or Switching, Picardo deposited them in Cargo's bank account, paid the owner-operators, and converted the balance into cash which he maintained he divided among his associates. Using what he claimed was invaluable knowledge gleaned from his college course in accounting, Picardo devised a score of plans to distribute 75 percent of his illgotten gains to his friends (A. 1065).[12]

His initial and simplest scheme was to write checks, which varied in amount but averaged $1,000 to $1,500, to either himself or to a fictitious payee and to cash them at Joe's Tavern, a local bar in Jersey City. On other occasions, these checks, bearing false notations (A. 1075) would be given to the petitioner, Thomas

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[11] As it later became clear, the ghosting operation uncovered by Seatrain executives was an operation conducted by Rosen with the consent of Seatrain's upper level executives to make up for lost revenues incurred as a result of not billing Seatrain's customers for trucking services (A. 2241-2243). This, of course, would constitute a violation of their tariff regulations and constitute the giving of unlawful rebates.

[12] Picardo claimed that he retained 25 percent (A. 1065); 25 percent went to the Briguglios, 25 percent to the Faugno-Andretta faction, and 25 percent to the Provenzano group (A. 1069-1071). The petitioner Provenzano, however, never personally received any money from Picardo (A. 1072). Nevertheless Picardo claimed that he informed Provenzano of his venture and received a compliment in return (A. 1073).

Andretta, who cashed them at Joe's (A. 1066).[13] On many occasions, Picardo claimed to have taken checks directly to Local 560 in Union City (A. 1067). After the checks were cashed, the proceeds were distributed at either Local 560 or in Armand Faugno's office in Jersey City.

The second method used by Picardo for generating cash was to loot Interocean's petty cash advance fund (A. 1089). This fund was maintained to assist owner-operators who needed loans or advances for tolls, gasoline, and to repair their equipment. Picardo, however, found another use for the fund. He, through Cargo, drew cash from the fund each day, which money was deducted from the total revenues due Cargo from Interocean. Picardo, however, added phantom drivers to his weekly bills to cover the amounts he had withdrawn from petty cash (A. 1090). The cash was then deposited in the Cargo account, made out to fictitious payees and cashed at a check-cashing service (A. 1091). A third method used by Picardo was to take personal loans from Interocean and repay these loans by adding ghosts to his invoices (A. 1093, but see for example A. 2003).

According to Picardo, he continued to disburse the carefully "washed" funds to his associates into 1972. Sometime in that year, however, Salvatore Briguglio, throwing caution to the wind, uncharacteristically asked Picardo to directly and by check, pay Briguglio's bills at the Rainbow's End Horse Farm (A. 1120).

Picardo maintained that he, through Cargo, continued to pay these bills on behalf of Briguglio and the

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[13] Though Picardo claims to have given the majority of these checks, which formed the first forty acts of racketeering (GX 104-143) to the petitioner, Thomas Andretta, to cash, the Government's handwriting expert who examined each of the questioned documents, determined that Mr. Andretta's fingerprints were not present on any of them. See the testimony of the FBI agent, Thomas B. Thompson at A. 2347-2351. Parenthetically, only Picardo's prints show up on exhibits 104-143.

petitioner, Provenzano, well into 1975 (A. 1122-1129, GX 18, 26, 27, 31, 32, 33, and 34).[14] Picardo, however, was contradicted by Maryanne Hart (A. 2642) and Paulette Compton (A. 2481, *et. seq.*) who were his employees and at various times shared his bed (A. 1372-1373, 2546, 2644-2655).[15] Compton testified that Picardo informed her that he had given two of his horses to Sal Briguglio's daughter as a gift (A. 2481) and had instructed her and Hart to pay for the horses' up-keep (A. 2481-2501). He never told Ms. Compton that either of the horses were given to Anthony Provenzano or his daughter.

By the late summer of 1973, Picardo learned that Seatrain was contemplating phasing out Interocean because of its unprofitability (A. 1149, 2373-2377). Picardo, therefore, took a bold step. Through a shell corporation called Trans Container Express Lines, he acquired the ICC rights to a corporation called Liftvan Transport, Inc. (A. 1169). Liftvan had ICC rights comparable to Interocean's and was in a position to compete with the latter for Seatrain's business.

In the late summer of 1973, Picardo, according to his testimony, was summoned to Local 560, where he met with Salvatore Briguglio, Sam Provenzano, and Thomas Durkin, Seatrain's attorney. Durkin, according to Picardo, wanted to know if he would be interested in operating Liftvan. Under the plan, Durkin, acting as Seatrain's attorney, would bankroll the operation. It was Durkin's plan to replace Interocean, which Durkin

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[14] The owner of the Horse Farm, David Rosen (A. 2881, *et. seq.*) did receive payment from Picardo for two horses, one ridden by Salvatore Briguglio's daughter, and the other by the defendant Provenzano's daughter. Yet Rosen simply assumed that each girl owned her respective horse (A. 2898). No ownership papers were available. To the contrary, the veterinary bills demonstrate that the owner of the horses was Ralph Picardo (GX 26, 32, A. 2898).

[15] Picardo prided himself on being a ladies' man and conceded that he used his charm to persuade women to assist him in various illegal schemes (A. 1366).

believed to be too costly an operation, with Liftvan, which had ICC rights similar to Interocean's (A. 1145, 1147-1149). Following the meeting, Picardo and Briguglio met privately and agreed that Durkin's proposition had merit. Briguglio, therefore, gave him the go-ahead (A. 1154). Despite Briguglio's okay, serious problems arose – Briguglio was sent to jail -- and according to Picardo, Pellecchia, who was making $50,000 a year through Interocean, complained that Picardo and Liftvan would destroy his job (A. 1154-1155). Consequently, Picardo, representing himself and Briguglio (see GX 371 and 372), travelled to Florida with the petitioner, Stephen Andretta, where they met the petitioner Provenzano at his residence in the Americana Hotel in Miami. Once there, Picardo claimed he convinced Provenzano to sanction Liftvan (A. 1157).[16]

In September 1973, Picardo began to operate Liftvan as its agent and by December of that year, he had purchased the company from Buck Borden for $205,000 payable over three years with monthly notes (A. 1169-1170). Picardo maintained that although he was the "front man," his associates were equal partners (A. 1171).

Despite Picardo's grand plan, Liftvan failed because Picardo was unable to secure any meaningful business from either Seatrain or other major steamship companies (A. 1198). In addition, in May 1974, Picardo was indicted for murder and from that point on devoted less and less time to his business and more and more of his time in the defense of the charges against him (A. 1216). In fact, at the time of Picardo's conviction for murder in February of 1975, Liftvan was virtually defunct (A. 2517).

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[16] An FBI check of the records of the Americana Hotel for a period which included October and November, 1973 failed to corroborate Picardo's tale. On the contrary, FBI Agent Thomas Smith (A. 3407-3420) testified that he checked the records of the Americana and found no record of Provenzano, Picardo, or Andretta being registered guests in the fall of 1973 (A. 3407-3409).

Picardo claimed that in the summer of 1974, he and his associates decided to form a new corporation to succeed to the rights of Cargo (A. 1194-1195). He claimed that the reason for the formation of the new corporation was twofold: to provide the petitioner, Thomas Andretta, with a legitimate source of income; and second, to take Picardo out of the picture because many of the steamship companies refused to deal with him (A. 1195, 2196).

Thereafter, he met with the petitioner Andretta's accountant, Thomas Florio, and they mutually agreed that Andretta's new corporation would purchase Cargo for a price of $30,000 (A. 1611-1612).

It was Picardo's position that the new corporation would be nothing more than a sham used to funnel funds from the ghosting operation. Consequently, after some discussion with the petitioner, Stephen Andretta, the name FLT was chosen (A. 1198).[17] In July of 1974, FLT took over the operation of Cargo (A. 1198-1200).

Shortly after the formation of FLT, Seatrain began to phase out Interocean (GX 340).[18] Interocean's switching functions were given to a company formed by Ralph Pellecchia called Di-Jub (A. 1200).

On August 14, 1974 Picardo received a check in the sum of $12,000 from FLT as the first installment for the purchase of his business (GX 144). The second installment for $18,000 was paid at the end of December

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[17] Picardo maintained that the name FLT was a joke and an acronym for a non-existent person. On the other hand, he conceded that the first names of three of Stephen Andretta's children coincide with the initials FLT (A. 1517-1519).

[18] According to the principals of both Seatrain and Interocean, Interocean was phased out primarily because Seatrain's Puerto Rican container operation was shut down. Therefore, Interocean, the trucking company which served that operation, was no longer needed.

1974 (GX 145). Picardo maintained that he converted each of these checks to cash and divided the proceeds among his "associates" (A. 1204-1210).[19]

In February of 1975, Picardo was convicted of conspiracy to commit murder and murder in the second degree. Following his conviction, he was remanded to the Hudson County Jail (A. 1217). Though Picardo continued to have sporadic contact with petitioner, Stephen Andretta (A. 1217), he no longer actively participated in the alleged scheme. On the contrary, after all of his attempts to extricate himself from jail had failed, he began to cooperate with the federal authorities.

Sometime in the summer of 1974, Raymond Rosen was informed by Pellecchia that FLT would take over Picardo's brokerage operation (A. 2193-2194). According to Rosen, Pellecchia said that despite Picardo's absence, everything would be handled by FLT (A. 2196). Thereafter, and through Labor Day of 1974, FLT supplied Interocean with drivers and Interocean paid FLT the same fee it had been paying Cargo (A. 2197-2199).

On Labor Day of 1974, Interocean formally stopped operating and was replaced in part by Di-Jub (A. 2205-2207). Thereafter and through December 1976, Di-Jub paid FLT its commission as the broker for the drivers (A. 2210-2211, GX 53-60, 224, 230).

In order to corroborate Picardo's testimony that FLT was nothing more than a paper corporation used to funnel funds to his associates, the prosecution called a series of "owner-operators," who, for the most part, had worked for Ralph Pellecchia under contract to Cargo as switchers in the Seatrain yard prior to 1974, and then operated under contract to FLT from mid-1974 until the end of 1976.

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[19] Picardo maintained that that $12,000 payment, together with an additional $18,000 payment made in December of 1974 by FLT to Cargo (GX 144, 145), was simply additional means through which he and his associates laundered money.

They testified, during the period of their contractual relationship with FLT, they never had any direct dealings with FLT; their salary was paid by Di-Jub; and they, in fact, had no contact with any one connected with FLT (A. 2567). Although they knew that petitioner, Thomas Andretta, was the President of FLT, they never received any instructions from Mr. Andretta.

Sometime toward the end of December 1976, Di-Jub learned that FLT and its officers were under criminal investigation. It, therefore, terminated their relationship (GX 339).

C. The Petitioners' Case.

The contentions raised by the defense were established through the cross-examination of all the prosecution witnesses and witnesses for the defense during the prosecution's case-in-chief. In addition, the defense called a number of witnesses to rebut specific allegations made by the Government's informant. See for example, the testimonies of FBI Agent Bergholtz, A. 3398, *et. seq.*; FBI Agent Smith, A. 3407, *et. seq.*; FBI Agent Cummings, A. 3477, *et. seq.*; and the testimony of Picardo's attorney, Dennis McGill, A. 3167, *et. seq.*; and that of Ronald Kucks, A. 3384, *et. seq.*

The contentions are generally contained within the statement of facts set forth above. A brief summary of those facts, however, would not be inappropriate. The petitioners maintained that Ralph Picardo was testifying falsely when he included them as beneficiaries of the ghosting operation he conducted through Cargo and against Interocean. In support of their theory, it will be recalled that Interocean's dispatchers, Heinlein and Kunze, conceded being bribed by Picardo so that they would not reveal his ghosting operation. Moreover, the defendants contended that Picardo's ghosting had no relationship to labor peace. Toward this conclusion, they pointed to

the testimony of witnesses, Affsa, Rosen, and Blanken, the management of Interocean, who asserted that they had no knowledge of Picardo's ghosting operation (Affsa, A. 1955-1956; Blanken, A. 1980, 1997, 2006, and 2011; Rosen, A. 2217-2269). These same individuals, however, admitted that they, at Interocean, had conducted their own ghosting operation. They maintained that this ghosting operation, which was totally independent of Picardo's scheme, had its origin in the special relationship that existed between Seatrain and Interocean. They believed, as did many of the executives at Seatrain, that the ghosting operation was conducted to cover up Seatrain's violation of the tariff regulations.

Consequently, the petitioners urged that any ghosting operation conducted by Interocean had absolutely nothing to do with any labor peace. This assumption was bolstered by the unequivocal testimony of each of those representatives that they had no knowledge of Picardo's scam.

The petitioners also claimed that there was, in fact, no need for Seatrain and Interocean to seek labor peace because under the Fair Labor Standards Management Act, Interocean had no obligation to unionize, and that the formation of Switching as a union shop was simply an accommodation to those prior employees of Victory Motor Transport who did not strike in 1967 (A. 2233). In addition, the petitioner, Anthony Provenzano, contended that he simply was not involved in the commission of any offense with relation to either Interocean or Seatrain.

At the conclusion of all of the evidence (A. 3493), each of the petitioners renewed their motions pursuant to Rule 29 for judgment of acquittal. These motions were in all respects denied (A. 3497).

Reasons for Granting the Writ

This petition raises pressing and substantial questions of interpretation with respect to the Racketeer Influence Corrupt Organizations ("RICO") Act (18 U.S.C. § 1961, *et. seq.*), which have not yet been considered by this Court.

The Third Circuit's interpretation of RICO to allow an "enterprise" to include an illegal group or association casts grave doubt on the constitutionality of the statute and contradicts, we believe, the congressional intent. This petition also raises a number of issues which are critically important in the area of how massive pre-trial publicity can taint a jury panel so as to deprive criminal defendants of their right to a fair and impartial jury and to due process of law under the Fifth and Sixth Amendments to the Constitution of the United States.

Moreover, this case contains a question relating to defendants' exclusion from a conference which resolved the issue of juror misconduct. An issue relating to the resolution of the juror misconduct issue by the Circuit Court is contained herein as well. Finally, a due process issue is raised over the Circuit Court's resolution of an erroneous ruling by the trial court relating to the admission of hearsay evidence.

ARGUMENT

POINT I

The Court Below Erred by Failing and Refusing to Excuse for Cause Several Prospective Jurors Who Were Tainted by Pre-Trial Media Coverage: By Compelling the Defendants to Exhaust Their Peremptory Challenges in an Attempt to Exclude Such Individuals, by Failing to Conduct an In-Depth Inquiry into the Nature and Effect of the Pre-Trial Publicity: And by Denying The Non-Provenzano Defendants' Motions for Severance and Change of Venue.

1. The Jury Selection Process.

The process of jury selection commenced on the morning of May 7, 1979. Concerned with frequent pre-trial media coverage directed against the appellant's co-defendant, Anthony Provenzano, the Trial Court proceeded to individually question the potential veniremen regarding their exposure to the media coverage (A. 433, 488, 549 *passim*).

In ruling on defense requests to dismiss various panel members for cause, Judge Meanor analytically classified those 42 individuals exhibiting familiarity with the case or the defendants into two categories (A. 4157-4158). The first category included those veniremen who were familiar with Mr. Provenzano's prior murder conviction. As to this category, the Court below, with the consent of the Government, granted defense challenges for cause (A. 750-752).

The second grouping included numerous panel members who exhibited a wide variety of prejudicial connotations relative to the petitioner Provenzano. In most part, these connotations concerned Mr. Provenzano's purported organized crime associations. Provenzano was stated to be familiar to these jurors as being connected with the "Mafia" or "mob" (A. 518-520, 709); as a "gangster" (A. 532); a "racketeer" (A. 727, 784);

an "underworld figure" (A. 727); or as otherwise being a member of organized crime (A. 588). Also included in this category were those veniremen who identified Mr. Provenzano as involved in "kickbacks into unions" (A. 589); "paybacks" (A. 725); and "extortion" (A. 600, 725). Jurors associating Mr. Provenzano with the disappearance and/or murder of James R. Hoffa also fell into this grouping (A. 602, 777) as did jurors citing Mr. Provenzano's involvement in union dealings.

As to those jurors included in this second analytical category, defense challenges for cause were denied by the Trial Court. As a result, defense counsel, who collectively exercised 14 peremptory challenges, were compelled to exhaust such challenges in an effort to exclude these veniremen from sitting in judgment of the petitioners.[20]

Of the 12 panel members ultimately seated, 9 had read or heard of the case or the defendants.[21] Included among the 9 were two (Jury Members 3 and 5) who had read or heard of the case that very morning. Another seated juror had heard of petitioner Provenzano "pretty regularly the past year," via newspaper and television, in the context of "racketeering" (A. 784). The sworn panel also included a juror who had heard of Mr. Provenzano's involvement "in some criminal proceedings" (A. 614).

Sworn as an alternate (Panel Member #52), was another individual who had read about petitioner Provenzano in that morning's newspaper. Stated this Juror:

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[20] This was the total exercise as to both regular and alternate jurors. Of the 14 challenges exercised peremptorily, 12 had some adverse knowledge of the petitioner Provenzano.

[21] Panel Members Nos. 3 (Juror #5); 10 (Juror #3); 20 (Juror #1); 26 (Juror #10); 30 (Juror #12); 49 (Juror #9); 54 (Juror #7); 56 (Juror #2); and 61 (Juror #4).

> "He (Provenzano) was an alleged racketeer and . . .he was brought up on charges. Extortion. Paybacks (A. 725). . .he's supposed to be an alleged racketeer or whatever, an underworld figure (A. 727)."

Only three of the twelve regular jurors had not originally heard or read of the case.[22] On the other hand, the Government exercised numerous peremptory challenges in excluding those individuals who had not heard of the case or of the petitioner Provenzano,[23] or whose acquaintance with such publicity was so sparse that they were unable to cite any prejudicial context.[24]

2. The Trial Court Erred by Failing to Excuse for Cause Individuals Tainted by Pre-Trial Media Coverage and by Compelling the Petitioners to Exhaust Peremptory Challenges in an Effort to Exclude Such Individuals.

The right to a jury trial guarantees an accused a fair trial by a panel of impartial, "indifferent jurors." *Irwin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961). The primary method used to achieve this right to trial by indifferent or impartial jurors is through the notion of challenges exercised during the jury *voir dire*. *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). It, therefore, follows that inhibition of the right to challenge for cause or peremptorily is deemed prejudicial error without the need to show actual prejudice. *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824 (1965). Applying this standard, the United States Court of Appeals for the Fifth Circuit found it reversible error to force a party to exhaust his peremptory challenges on a person who should have been excused for cause for this "has the effect of abridging the right to exercise peremptory

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[22] Panel Members Nos. 17 (Juror #8); 23 (Juror #11); and 60 (Juror #6).

[23] Panel Members Nos. 12, 24, and 37.

[24] Panel Members Nos. 18, 22, and 29.

challenges." *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976). See also *United States v. Eubanks*, 591 F.2d 513, 516-517 (9th Cir. 1979). A Trial Court must, therefore, excuse a prospective juror if actual bias is discovered during the *voir dire*. Actual bias, however, is not always discovered by the express admission of a prospective juror. Often a putative venireman is reluctant to admit actual bias and the peculiarity of his or her attitudes must be revealed by "circumstantial evidence." See *Kiernan v. Van Schaik*, 347 F.2d 775, 781 (3d Cir. 1965). In the instant case, the "circumstantial evidence," which demonstrated actual bias in a number of prospective jurors, was based in large measure on media coverage of the petitioner Provenzano.

In *Murphy v. Florida*, 421 U.S. 794, 85 S.Ct. 2031 (1975), the United States Supreme Court had occasion to enumerate the guiding principles controlling the selection of jurors exposed to pre-trial publicity or knowledge.

The Supreme Court in *Murphy* declined to reverse the defendant's conviction. In so doing, it defined the minimal constitutional standard, to be applied when reviewing state cases, as follows:

> "Qualified jurors need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in Court." 421 U.S. at 800.

The Court, in reasoning that reversal of Murphy's conviction was not constitutionally compelled, stated that while some of the jurors had a vague recollection of the robbery with which petitioner was charged, and each had some knowledge of his past crimes, none betrayed any deep impression of Murphy or a belief in the relevance of his past to the case at hand.

In so deciding, the *Murphy* Court distinguished those instances where a federal appellate tribunal is reviewing decisions of federal trial courts, and expressly cited its

decision in *Marshall v. United States*, 360 U.S. 310, L.Ed. 2d 1250, 79 S.Ct. 1171 (1959) and the decision of the Third Circuit Court of Appeals in *United States ex. rel. Doggett v. Yeager*, 472 F.2d 229 (3d Cir. 1973). In such instances, noted the Court, a less stricter standard of scrutiny will prevail.[25]

Marshall, supra, which contains the standard of review for federal cases, involved two newspaper articles containing prejudicial information which reached a substantial number of the jurors during the trial. The Trial Court, as in the case *sub judice*, summoned the jurors into his chambers and inquired individually whether they had seen the articles. Each of the jurors replied that they would not be influenced by the articles, that they would decide the case strictly on the evidence, and that they felt no prejudice as a result of the articles. Nevertheless, in the exercise of its supervisory power to formulate and apply proper standards for enforcement of criminal law in the federal courts, and not as a matter of constitutional compulsion, the Supreme Court reversed defendant's conviction and ordered that a new trial be granted. Obviously this Court did not believe that the mere expurgatory oath taken by the jurors who had seen the news stories was sufficient to purge them of probable bias. In the case *sub judice*, the Trial Court admitted that the petitioner Provenzano appeared frequently in the media (A. 549). On at least three occasions during the *voir dire*, the trial judge expressed his belief that no jury could be impaneled in the Newark area which had not heard Mr. Provenzano's name in one context or another (A. 549, 699, 705).

Upon being asked whether they could sit and judge the petitioners fairly and impartially, many of the veniremen expressed their belief that they could do so. However,

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[25] Indeed, it is interesting to note that Chief Justice Burger, concurring in *Murphy*, opined that while the circumstances involved did not rise to a violation of the Due Process Clause of the Fourteenth Amendment, he would not hesitate to reverse Murphy's conviction in the exercise of the Court's supervisory powers were it a federal case. 421 U.S. at p. 084.

even under the stricter constitutional standard, such assurances could not be taken at face value based upon what the trial judge expressly recognized to be widespread pre-trial publicity, and all inferences must be drawn against such casual assurances. Where, as here, most veniremen have been exposed to such publicity, the reliability of their protestations of impartiality must be drawn into question. Merely going through the form of obtaining the jurors' assurances that they are equal to the task will not suffice. *Cf., Murphy v. Florida, supra*, 421 U.S. at 800; *United States ex. rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2d Cir. 1963), *cert. den. Denno v. Bloeth*, 83 S.Ct. 112, 373 U.S. 978, 10 L.Ed. 2d 143; *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), appeal after remand, 430 F.2d 675 (1970), *cert. den.* 400 U.S. 1022, 91 S.Ct. 585, 27 L.Ed. 2d 633.

As noted by the United States Court of Appeals for the First Circuit in *Delaney v. United States*, 199 F.2d 107, 112-113 (1st Cir. 1952):

> "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity."

In *United States ex. rel. Doggett v. Yeager*, 472 F.2d 229 (3d Cir. 1973) (later stated by the *Murphy* Court to have applied the less stringent *Marshall* standard when dealing with federal cases, this Court, in remanding for a new trial, cited the American Bar Association Project on Standards for Criminal Justice, Fair Trial, Free Press, § 3.4(b):

> "A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminatory matters that may

> be inadmissible in evidence, or substantial amounts of inflammatory materials, shall be subject to challenge for cause *without regard to his testimony as to state of mind.* (emphasis supplied)

Applying the *Marshall-Yeager* standard to the facts of this instant case, one is left with an abiding conviction that the petitioners were compelled to exercise peremptory challenges to excuse the jurors who should have been excused for cause. Typical attempts at judicial ablution resulted in the following: Panel Member No. 9, Nancy Swanson -- stated that while she would "try to suppress her prior knowledge of petitioner Provenzano as a "Mafia" member, "I don't know though" (A. 520-521). A defense challenge for cause was denied by the Trial Court (A. 546) and petitioners were required to exercise one of their peremptory challenges (A. 546, 748).

Panel Member No. 11, Edward Popek -- stated that he "guesses" he could put the publicity out of his mind (A. 526). Again the defense took a peremptory challenge.

Panel Member No. 14, Nancy Veit -- knew petitioner Provenzano as a "gangster." As to her ability to decide the case fairly, she stated "Yeah, I think -- I don't know. . .I think so" (A. 533). The Trial Court twice refused to excuse Ms. Veit for cause (A. 547, 805), and the defense again challenged peremptorily (A. 547).

Panel Member No. 59, Michael Sverada -- identified Mr. Provenzano with the Hoffa disappearance. When asked if the pre-trial accounts would influence him, he stated, "I don't think so. Maybe. I don't know. I don't think so" (A. 778). Once again a peremptory challenge was employed to exclude Mr. Sverada.

Panel Member No. 21, Loretta Leckie -- identified the petitioner Provenzano as a member of "organized crime" (A. 588). When asked if she could render a fair and impartial verdict, she responded "Yes, I think I could" (A. 590).

A careful reading of the entire *voir dire* reveals that although most of the panel members who were interviewed exhibited a superficial willingness to put aside their bias, they, in reality, could not. Where a juror's protestation of unaffected impartiality is unconvincing or doubtful, as in the instant case, a new trial must be ordered. (c.f.) *Irwin v. Dowd,* 366 U.S. 717, 6 L.Ed. 2d 751, 81 S.Ct. 1639 (1961); *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963); *Delaney v. United States, supra.*[26]

However, in that case the Court erroneously applied the *Murphy* standard and none of the tainted jurors served on the panel. In *United States v. Nell, supra,* the Court stated:

> "We have no psychic calibers with which to measure the purity of the prospective juror; rather, our mundane experience must guide us to the impartial jury promised by the Sixth Amendment. Doubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid." 526 F.2d at 1230.

Further comments by the *Nell* Court as to the import of peremptory challenges are particularly relevant to the case *sub judice.*

> "The jury box is a holy place. To ensure that those who enter are purged of prejudice, both challenges for cause and the full complement of peremptory challenges are crucial. Therefore, as a general rule, it is error for a court to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges. (Citations

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[26] The defendant is not unmindful of the decision of the Sixth Circuit in *United States v. Giacalone,* 588 F.2d 1158 (6th Cir. 1978).

> omitted). At stake is the party's right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the *voir dire* of prospective jurors." 526 F.2d at 1226.

In the case *sub judice*, the defendants collectively exercised all their peremptory challenges. As noted, most were necessarily taken on panel members whose stated ability to be impartial was less than steadfast.

As also noted earlier, the defense was required to employ peremptory challenges on other jurors exhibiting knowledge of the case whom the Trial Court had declined to excuse for cause. These jurors variously identified petitioner Provenzano as a "Mafia" member, a "gangster," and an "organized crime" figure, as well as being involved in "kickbacks into unions" and union activities.

The refusal of the Trial Court to dismiss these jurors for cause is especially significant in view of the nature of the Government's case against the defendants. The indictment charged these defendants with engaging in an organized conspiracy to unlawfully accept payments in return for labor peace. The chief prosecutor made clear in his opening statement that the charges against the defendants involved "labor racketeering" (A. 835). The key prosecution witness, Ralph Picardo, went to great lengths to consistently emphasize that illegal payments were being made to an "association" of individuals, including Thomas and Stephen Andretta, and guided by Anthony Provenzano.

Pre-trial publicity, which links a defendant with persons who are called "mob," "underworld," "gangster," "racketeers," etc., changes the way jurors perceive that defendant, reduces the credibility of the defendant, and raises the resistance of jurors to anything said by or on

behalf of the defendant. Jurors predisposed to so categorize the petitioner Provenzano could naturally be expected to take a similar view toward these defendants by virtue of their social or business acquaintances with him. As a result of such publicity, these jurors would be predisposed to see these defendants as guilty and to opt toward guilt in their deliberations.

> "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irwin v. Dowd*, 366 U.S. 717, 727, 6 L.Ed. 2d 751, 579, 81 S.Ct. 1639 (1961).

The Supreme Court has stated that the peremptory challenge, although not required by the Constitution, is "one of the most important of the rights secured to the accused," and that "the denial or impairment of the right is reversible error without a showing of prejudice." *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 385, 13 L.Ed. 2d 759 (1965).

> "For it is as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." *Lewis v. United States*, 146 U.S. 370, 378, 36 L.Ed. 1011, 1014, 13 S.Ct. 136.

See also, *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed. 2d 706 (1973).

The evil sought to be prevented is that a defendant not be compelled to accept an objectionable juror due to the fact that he be forced to utilize one of his peremptory challenges to excuse a juror who should have been excused for cause. In requiring these defendants to exhaust their peremptory challenges to excuse jurors exhibiting such prejudicial preconceptions as aforesaid, they were denied their basic right to exclude peremptorily those veniremen who may have otherwise been objectionable.

3. The Trial Court Erred in Failing to Inquire Further into the Nature and Effect of the Pre-Trial Publicity.

Many jurors when questioned stated their ability to be fair despite their prior knowledge of the case. Defense counsel protested their not being given an adequate opportunity to demonstrate that the individuals were, in fact, irreparably prejudicial and should be subjected to challenge for cause (A. 698-699).

In particular, one panel member indicated that there had been discussions among the jury panel regarding petitioner Provenzano and the fact that he was currently serving a 99-year sentence pursuant to a murder conviction. The Trial Court refused to pursue the matter of such prejudicial discussions among jurors, despite stringent defense requests to do so (A. 720-723).

It has long been held that:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907).

Although the Trial Court has broad discretion in its conduct of *voir dire, Ristaino v. Ross*, 424 U.S. 589, 594, 96 S.Ct. 1017, 47 L.Ed. 2d 258 (1956), its exercise of that discretion is "subject to the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310, 75 L.Ed. 1054, 1056, 51 S.Ct. 470, 471 (1931).

In refusing to afford defense counsel the opportunity to further pursue the dissemination of prejudicial information among the jurors and to ask those questions which they considered necessary for fully exercising their challenges, the Trial Court abused its discretion. The failure to adequately inquire into the effect of pretrial publicity upon the jurors or to inquire whether

the jurors exposed to the prejudicial information discussed it with others constituted error mandating reversal of the petitioners' convictions. *See, e.g., United States ex. rel. Doggett v. Yeager*, 472 F.2d 229 (3d Cir. 1973); *United States v. Dellinger, supra*; *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), appeal after remand, 430 F.2d 675 (1970), *cert. denied*, 400 U.S. 1022, 91 S.Ct. 585, 27 L.Ed. 2d 633.

4. The Trial Court Erroneously Denied Defense Motions for Severance and Change of Venue.

Faced with the widespread media identification of co-petitioner Provenzano, the denial of their challenges for cause, the fact that they were required to exercise their challenges jointly with the petitioner Provenzano, and the curtailment of their unfettered right to exercise peremptory challenges, defense counsel moved the Court to consider other alternatives.

Petitioners Thomas and Stephen Andretta and Gabriel Briguglio, moved for severance in an effort to free themselves from the taint manifestly attributable to Provenzano (A. 722-723). However, the Trial Court declined the request to sever.

Defense counsel also moved for a change of venue (A. 791). Notwithstanding that the Trial Court on three occasions expressed its belief that no jury could be impaneled in the Newark area that had not been exposed to the media coverage (A. 549, 699, 705), it declined to transfer venue.

Courts have repeatedly held that the opportunity provided by *voir dire* examination is no substitute for a venue change from a community impregnated with prejudice. The Supreme Court has explicitly recognized that *voir dire* may be inadequate because it is often impossible to determine, much less defeat, the subtle operation of prejudice in a criminal trial in a particular

community. *Irwin v. Dowd, supra; Rideau v. Louisiana, supra; Sheppard v. Maxwell*, 384 U.S. 333 (1966).

This reviewing tribunal, in rejecting various challenges to the *voir dire* examination of prospective jurors, has repeatedly highlighted the utility of a change of vicinage. *See, e.g., United States v. Dansker*, 537 F.2d 40 (3d Cir. 1976) (jury selected from different vicinage); *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1972), *cert. denied*, 92 S.Ct. 949, 405 U.S. 936, 30 L.Ed. 2d 812, *rehearing denied*, 92 S.Ct. 1309, 405 U.S. 1048, 31 L.Ed. 2d 591 (Trial Court transferred the proceedings from Newark to Trenton vicinage; court dismissed on its own motion each prospective juror who indicated extensive exposure to pre-trial publicity, without regard to protestations of impartiality). The failure of the Trial Court, obviously cognizant of the widespread media attention in the Newark area as reflected in the responses of the potential jurors, to transfer venue to a vicinage where the effects of pre-trial publicity would be minimized can only be classified as error requiring reversal of these petitioners' convictions.

In conclusion, it is difficult to imagine a jury selection more laden with prejudicial overtones than the case at bar.[27] When one adds the fact that the jury panel then actually discussed a prior conviction and sentence of a petitioner (Provenzano -- 99 years for murder) and the Court stonewalled the defense counsel from pursuing an inquiry as to the effect of this conversation, reversal becomes even more mandated. Such events were not

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[27] While petitioners feel that substantial prejudice has been adequately demonstrated under any test the Circuit Court's application of the facts of *United States v. D'Andrea*, 495 F.2d 1170 (3d Cir. 1974), *cert. denied*, 419 U.S. 855 (1974) to the instant case seems misplaced. *D'Andrea*'s "prejudice" was one article, in one paper on the 35th day of trial after the evidence had been given to the jury, and which was read by only one juror and one alternate and contained nothing directly incriminating with the case on trial (referred to an assault charge in another jurisdiction from the present tax evasion charge). The dissemblence is amazing save an abiding faith in the juror's assurance of continuing impartiality.

unavoidable. Surely jurors who had no preconceived notion of the petitioner could have been brought to Court if the Presiding Officer were not overly concerned with a quick jury selection. If his fears that no such jury were possible in the Newark area, then a change of venue remedied the problem. No curative measures were taken or attempted.

POINT II

The Circuit Court's Resolution of the Juror Misconduct Issue Was Constitutionally Erroneous.

Despite the fact that one regular juror and two alternates were found to have engaged in criminal conduct while the jury was sequestered, the Court of Appeals found no error arising from the incident. By condoning the conduct of these jurors, who apparently thought of their service more as a party than a solemn undertaking, the Court not only countenanced a violation of the integrity of the entire federal court system but, more importantly, deprived petitioners of their Sixth Amendment right to a fair and impartial jury. Furthermore, the Court's error was compounded by its failure to even address petitioners' request for an evidentiary hearing at which the extent of the jurors' misconduct and its effect upon them could be explored.

The Court of Appeals, without "engaging in extended philosophical discussion" of where the line might be drawn "in a proper case," simply held that "public knowledge that sitting jurors were smoking marijuana does not create such an appearance of impropriety as to warrant reversal of convictions where the jurors were not dismissed." (Slip. Op. 19-20.) By so holding, the Court went far wide of the mark. While it belies reality to sug-

gest that there is no "appearance of impropriety"[28] in permitting jurors, particularly when sequestered, to violate the law by smoking marijuana,[29] this is merely the beginning of the inquiry, not the end.

The Court of Appeals went on to state that there was "no serious contention that the drug's intoxicating effect affected the jurors' ability to hear evidence or to deliberate." (Slip. Op. 20.) Noting that the consumption of alcohol is "not prejudicial as a matter of law," they held that "appellants have not demonstrated prejudice as required by such cases as" *United States v. Talisferro*, 558 F.2d 724, 726 (4th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978), and *United States v. Klee*, 494 F.2d 399, 395 (9th Cir. 1974), *cert. denied*, 419 U.S. 835 (1974). That reasoning was shockingly faulty in several respects.

First, petitioners did, and do, seriously contend that the use of marijuana could affect the mind of the jurors and therefore their ability to properly receive and deliberate upon the evidence. Indeed, petitioners specifically cited a recent Government study dealing with the long-term effect of marijuana in the human mind. *Marijuana, Research Findings 1976*, pp. 140-141 (U.S. Dept. of HEW, 1977). Secondly, and more importantly, petitioners were denied a hearing at which they might have developed evidence concerning the use of

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[28] As Judge Seitz said, speaking for this same court in *United States ex rel. Stewart v. Hewitt*, 517 F.2d 993, 996 (3d Cir. 1975), the appearance of impropriety has the necessary consequence of "infecting public respect for the verdict."

[29] As the Court of Appeals correctly noted, possession of marijuana is illegal under both federal and state law. (Slip. Op. 19).

marijuana by this juror, and possibly others,[30] and at which expert testimony could have been presented with respect to marijuana's deleterious effect on the mind. It is the denial of a hearing which makes the Court's reliance upon *United States v. Taliaferro, supra*, so misplaced, for in that case a full evidentiary hearing was conducted. See also, *United States v. Allen*, 588 F.2d 1100 (5th Cir. 1979). Indeed, it seems almost beyond question that when juror misconduct raises a reasonable doubt as to the integrity of the jury, a hearing is required. See *United States v. Moten*, 582 F.2d 667 (2d Cir. 1978).

The Sixth Amendment guarantees a defendant "trial by a panel of impartial, 'indifferent' jurors." *Irwin v. Dowd*, 366 U.S. 717, 722 (1961). Included in that guarantee, petitioners suggest, is an absolute right to the judgment of jurors whose minds are not, nor could even be suspected of being, clouded or befuddled by the use of drugs. That right is hardly satisfied by the Trial Court's observation, months after the event, that the jurors had seemed to him to be functioning normally (Slip. Op. 20; SA 58-59).[31] As one state court noted, in an old case dealing with alcohol intoxication, "jurors whose minds are clouded. . .and their powers of conception blunted by its effects, are incompetent to appreciate the high responsibilities of their duties." *United States v. Spencer*, 47 P. 715 (N.M. 1896). Nor is the fact that only one regular juror was involved of any significance. As this Court has said, a defendant "is entitled to be tried by 12, not 9 or even 10, impartial

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[30] The entire incident cried out for a hearing to determine, among other things, whether other jurors had participated in the same misconduct. The marijuana had been passed to the regular juror by a visitor on Sunday. It is not fanciful to suggest that she might have shared it with others on Sunday, Monday or on Tuesday before they were discovered.

[31] SA references are to the joint supplemental appendix.

and unprejudiced jurors" *Parker v. Gladden*, 385 U.S. 363, 366 (1966).[32]

Apart from the Sixth Amendment violation, this incident calls for the exercise of this Court's supervisory power which, as noted recently in *United States v. Payner*, _____ U.S. _____ (June 23, 1980), is still alive and well. As Mr. Justice Brennan said in his dissent, the supervisory power is exercised "to protect the integrity of the *court*, rather than to vindicate the constitutional rights of the defendant. . . ."[33] There could hardly be a more appropriate case than the present one for invocation of this power to reaffirm the integrity of the judicial system. The decision below condones the most egregious type of juror misconduct and places its stamp of approval on the trial judge's view that this matter was simply a "tempest in a teapot" (SA 98). Petitioners suggest that such an assessment of the incident entirely misses its significance, not only for these defendants but for the administration of justice as well. This Court should grant review in order to condemn this conduct in the strongest of terms, thereby securing petitioners' right to a fair trial and the Court's right to an untarnished judicial system.[34]

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[32] The jurors' impartiality was also seriously undermined by the court's conferring of *de facto* immunity for their conduct. The Court of Appeals rejected petitioners' suggestion that the court's assurances might prejudice the jurors toward the government, noting that it was defense counsel who asked for some comment of this type. (Slip. Op. 20-21.) But the dilemma was not of defendants' making. The possibility that the jurors might be biased whether given an assurance or not, simply strengthens petitioners' position that the only sure remedy was for the court to *sua sponte* excuse the offending jurors.

[33] It is precisely because the aim is to protect the integrity of the court system, and not the defendants, that defense counsel's acquiesence in retention of this juror is of no moment. (Slip. Op. 19.) This was the position urged by petitioners before the Court of Appeals.

[34] At the very least, this Court should summarily remand the case for a full hearing on the juror misconduct, its extent and its effect.

POINT III

A Split Among the Circuits on the Issue of Defendants' Presence At a Conference on a Juror Issue Makes Review by This Court Appropriate.

Though agreeing that none of the defendants were personally present at the conference in chambers when counsel were informed of the marijuana incident, and that none of the defendants learned of the event until after the trial (Slip. Op. 19), the Court held that "there is no *constitutional* right for a defendant to be present at a conference in chambers concerning dismissal of a juror" (emphasis in original) (Slip. Op. 21). This holding confirms and further widens a split among the Circuits on this important issue. The Court's opinion also rejects the view of most other Circuits that such a conference comes within the purview of Rule 43 Fed. R. Crim. P. Neither of these questions have been addressed by this Court in recent times.

The constitutional issue flows from this Court's decisions as far back as *Hopt v. Utah*, 110 U.S. 574 (1884), and *Snyder v. Massachusetts*, 291 U.S. 97 (1934). In the latter case this Court held that the due process clause gave the defendant a privilege to be personally present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." 291 U.S. at 105. His presence is mandated "to the extent that a fair and just hearing would be thwarted by his presence." *Id.* at 107-108; *Faretta v. California*, 422 U.S. 806, 819 n.45 (1975). On the other hand, the defendant need not be present "if his presence would be useless or the benefit but a shadow." *Snyder, supra*, at 106.

The view espoused by the Third Circuit in this case is apparently shared by the Fifth, *United States v. Howell*, 514 F.2d 710 (5th Cir. 1975), and the Sixth, *United States*

v. Brown, 571 F.2d 980 (6th Cir. 1978).[35] Expressing a contrary view are the Eighth Circuit, *Blackwell v. Brewer*, 562 F.2d 596 (8th Cir. 1977); *Nevels v. Parratt*, 596 F.2d 344, 346 (8th Cir. 1979); and the Fourth, *Near v. Cunningham*, 313 F.2d 929 (4th Cir. 1963), as well as several well-reasoned state court decisions. *Bunch v. State*, 381 A.2d 1142 (Md. 1978); *Commonwealth v. Robichaud*, 264 N.E.2d 374 (Mass. 1970); *People v. Harris*, 204 N.W.2d 734 (Mich. App. 1972). The position of the Tenth Circuit is somewhat ambiguous. Compare *United States v. Baca*, 494 F.2d 424 (10th Cir. 1974) with *Ellis v. Oklahoma*, 430 F.2d 1352 (10th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

In *Bunch v. State, supra*, a juror sent a note to the court indicating that he might be biased. The defendant was not permitted to be present at a conference between counsel and the court at which the matter was discussed and ruled upon. Noting that Maryland had a court rule virtually identical to Federal Rule 43, and particularly mindful of the constitutional underpinnings of the rule, the court held that proceedings at which questions of juror disqualification are determined are stages of the trial requiring the defendant's presence, just as much as the initial impaneling of the jury. 381 A.2d at 1144-1145. In *Commonwealth v. Robichaud, supra*, the defendant was also excluded from an inquiry into juror misconduct at which his attorney was present. The court concluded the defendant's presence at such a hearing

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[35] Where both the defendant and his attorney were absent from the conference the court reached a different result. *United States v. Gay*, 522 F.2d 435 (6th Cir. 1975). It is important to note that in *Brown*, as in *United States v. Baca*, the offending juror was excused, rather than retained as in this case. Clearly, the court has a great deal more leeway in excusing questionable jurors than in keeping them on the jury.

"no less crucial as a safeguard of his right to an impartial jury" than when the jurors are initially examined. Indeed, the fact that the trial judge found no misconduct warranting relief did not dictate a contrary result. The important point, the court noted, was that defendant's presence might have been of value to his attorney. *Nevels v. Parratt, supra; Ellis v. Oklahoma, supra;* and *Near v. Cunningham, supra,* all hold that defendant's absence from such a conference requires a presumption of prejudice due to the constitutional violation involved.

The opinion below has also created a divergence of views among the circuits on the proper interpretation of Rule 43. The Court held that the in-chambers conference on juror misconduct "concerned only a question of law," thereby falling within the exception provided by Subsection (c) of Rule 43 (Slip. Op. 22). However, as the Court acknowledged, that holding is directly contrary to both *United States v. Brown, supra,* and *United States v. Baca, supra,* the two cases upon which the Court relied in rejecting petitioners' constitutional argument. Thus, with its decision the Court has created a new split among the Circuits.

The Court's view that petitioners somehow waived their Rule 43 right by virtue of their counsel's failure to object, is not only specious but circular. If the right is personal to the defendant and if the defendant is never informed of the conference by his attorney, it is difficult to see how he could waive a right of which he never became aware.[36] Adoption of that waiver rationale would simply negate the Rule.

The Court's suggestion that any error is cured by the harmless error doctrine (Slip. Op. 22) does not solve

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[36] On this waiver issue the court never mentioned that at least twice earlier in the trial petitioners had specifically requested to be present at all side-bar and in-chambers conferences (A. 1023-1025, A. 1215), requests which were denied.

the problem, but simply further complicates it. The Government's burden to demonstrate harmless error in this situation is a heavy one. *Blackwell v. Brewer, supra.* The standard is not whether the defendant was actually prejudiced, but whether there was "any reasonable possibility of prejudice." *Wade v. United States*, 441 F.2d 1046, 1050 (D.C. Cir. 1971). In effect, because of the constitutional basis of the right involved, prejudice is presumed and the record must completely negate any reasonable possibility of prejudice. *Ellis v. Oklahoma, supra.* Where the matter discussed at the conference is not trivial or insubstantial, it cannot be found to be harmless. *Evans v. United States*, 284 F.2d 393, 395 (6th Cir. 1960). Clearly, the issue of juror misconduct could rarely be found harmless under these standards, and certainly not in this case. The Court's statement that it is "fanciful" for petitioners to suggest that they would have demanded replacement of the offending juror if they had been present at the conference (Slip. Op. 22) is itself fanciful. The only competent evidence of what petitioners would have done is found in their own affidavit, where they categorically state that they would have insisted on the juror's removal. It is also difficult to subscribe to the Court's view that counsel "vigorously safeguarded" petitioners' interests when they did not even inform them as to the subject matter of the conference. Petitioners' presence would have been far from "useless." Rather, it bore a "reasonably substantial relationship to his opportunity to defend." *Snyder v. Massachusetts, supra.*

With respect to the constitutional issue involved, the interpretation of Rule 43, and the application of the harmless error doctrine to either or both of these issues, this case clearly merits review.

POINT IV

The Circuit Court's Invocation of the Second Circuit's "Rosenstein Rule" Deprived Petitioners of Due Process; Examination by This Court of the "Rosenstein Rule" Is Both Timely and Appropriate.

The case against Provenzano, as even the District Court acknowledged,[37] was a close one. It was argued in the Circuit Court that in a case as close as this one, erroneous admission of prejudicial hearsay could have been "the weight that tipped the scales" against Petitioners. *Krulewitch v. United States*, 336 U.S. 440 (1949). This observation served as the backdrop of the claim that the District Court had erred in admitting hearsay which unfairly bolstered what was claimed to have been the highly suspect testimony of the Government's principal witness, Ralph Picardo. The specific claim was that Picardo's statements to others, not in furtherance of the conspiracy, and thus not admissible under Fed. R. Evid. 801(d)(2)(E) constituted narrative hearsay which was clearly inadmissible. The "in furtherance" requirement is, of course, an important feature of the Rule. *United States v. Nixon*, 418 U.S. 683, 702 (1974); *Anderson v. United States*, 417 U.S. 211, 218-19 (1974). Thus, under Rule 104(a) of the Federal Rules of Evidence it was incumbent upon the District Court to find that the questioned statements *inter alia* were made in furtherance of the conspiracy before admitting them.

In its opinion (page 28) the Court agreed that at least with respect to some of these statements the Trial Court had misconstrued the Rule and thus erroneously admitted the testimony. Although making no finding of harmless error the Court nevertheless affirmed the conviction upon the ground that these statements were admissible under an alternate theory, never argued by the

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[37] The trial court stated that direct evidence of Provenzano's involvement in the conspiracy alleged was "rather sparse." (A. 3344).

Government in the Trial Court, that the statements were introducible as prior consistent statements under Fed. R. Evid. 801(d)(1)(B). For this proposition the Circuit Court relied upon a seven-year-old decision of the Second Circuit Court of Appeals in *United States v. Rosenstein*, 474 F.2d 705, 711-713 (2d Cir. 1973).

In short, *Rosenstein* stands for the proposition that a conviction may be affirmed on appeal for reasons different than those followed in the Trial Court, as long as the questioned evidence would be alternatively admissible for the same purpose. But application of *Rosenstein*, which has now spread beyond the Second Circuit, works an unfairly inconsistent result. It allows the Government an advantage on appeal not shared by criminal defendants. And it is also that this advantage is one that is plainly contradicted by the Federal Rules of Criminal Procedure.

Rule 12(f) of the Federal Rules of Criminal Procedure clearly states that "failure by a party to raise. . . objections. . .shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." This Rule has caused courts, including the Second Circuit Court of Appeals, to hold as in *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 431 U.S. 959 (1977), that:

> ". . .where a party has shifted his position on appeal and advances arguments available but not pressed below, *United States v. Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976), and where that party has had ample opportunity to make the point in the trial court in a timely manner, *United States v. Rollins*, 522 F.2d 160, 165 (2d. Cir. 1975), cert. denied, 424 U.S. 918, 96 S.Ct. 1122, 47 L.Ed. 2d 325 (1976), waiver will bar raising the issue on appeal."

When placed side by side with the "*Rosenstein* rule" the following appears to be the present state of procedural law on this subject. A convicted criminal defendant is on appeal limited, with rare exception under Rule 52(b), to arguments specifically raised in the Trial Court while the Government is free to make and develop *any* argument on appeal. Such a rule is, it is submitted, fundamentally unfair. Especially so in this case. As Provenzano urged in the Court below, there were arguments which could best be judged by the Trial Court whose intimate familiarity with the facts was unparalleled, that could well have stemmed any attempt by the Government to admit this testimony under the prior consistent statement rule. For example, the facts of this case will support an argument that the witness Picardo had a motive to falsify, albeit a different motive than was created by his arrest for murder in 1975, at the same time that he allegedly made these prior statements. This argument, however, was never made to the District Court because the Government never attempted to introduce the statements under Rule 801(d)(1)(E). Since defense counsel did not have the opportunity at trial to address the peculiar issues raised by admission under this theory, the Government should have been foreclosed from arguing it on appeal. "Arguments defense counsel could have made. . .were never made because they were not apposite." *United States v. Kaplan*, 510 F.2d 606 (2d Cir. 1974) (on petition for rehearing).

If the Circuit Courts are to freely apply, as the Third Circuit did here, the "*Rosenstein* rule," there must be a pronouncement by this Court as to its dimensions. In this case it is respectfully submitted *Rosenstein* had no application and to have applied it deprived petitioners of their right to due process.

POINT V

The Ruling of the Court Below Utterly Misapprehended the Policy Considerations and Legislative Intent of RICO and Has Permitted RICO to Be Applied in a Facially Unconstitutional Manner.

As has been shown, this was a RICO prosecution. It is the contention of the petitioners that by permitting the convictions to stand, the Court of Appeals has utterly misapprehended the policy considerations and legislative intent of RICO and has sanctioned its facially unconstitutional application. Moreover, the ruling of the Court of Appeals would appear to place the Third Circuit in conflict with the Sixth Circuit Panel which decided *United States v. Sutton*, 605 F.2d 260 (1979).[38]

Upon analysis of the RICO floor debates, it becomes readily apparent that Congress was fully cognizant that "illegitimate business," "racketeering," and "crime for crime's sake" had already been comprehensively proscribed by existing federal and state laws *even without the enactment of RICO* as perhaps best typified by the legislation permitting criminal "conspiracy" prosecutions. Indeed, Senator McClellan, who introduced S. 1861 -- which together with S. 1623 comprises RICO in its present form -- was prompted to observe that unlike existing statutes, RICO was specifically aimed at those who "operate illegitimately in legitimate channels." (116 Cong. Rec. at 8671, 1970).

RICO's legislative history thus makes clear, that RICO focused upon that special kind of racketeering activity undertaken to subvert legitimate institutions. With regard to that type of "racketeering activity" which affect the particular purpose of causing the subversion

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[38] We say "appear" because rehearing *en banc* was sought by the Government and granted in *United States v. Sutton* and the decision of the Panel was vacated pending *en banc* consideration (Nos. 78-5134 to 5139, 5141, 5143 (6th Cir. Nov. 7, 1979) (rehearing held April 2, 1980)).

of legitimate business, RICO prescribed even harsher penal sanctions than those authorized by federal and state statutes which had already proscribed "racketeering" and criminal activity in general.

Central to the RICO statutory scheme is the concept of "enterprise." Indeed, the salient and distinguishing feature of every RICO prosecution is that the offense charged must, as a matter of law, have some connection with an "enterprise."

Title 18 U.S.C. § 1961(4) defines "enterprise" as follows:

> " 'Enterprise' includes any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated, in fact, although not a legal entity."

Although § 1961(4) catalogues the types of organizational units that may qualify as an "enterprise" for statutory purposes, significantly, the entire RICO legislation is silent as to what these units must do or undertake to do before they may, in fact, constitute the requisite "enterprise." The *Sutton* Panel stated the dilemma posed for a reviewing court as follows:

> "Obviously every 'individual' or 'group' of individuals considered in the abstract, is not an 'enterprise'. Individuals and groups do not become an 'enterprise' except in relation to something they do. The statutory definition of 'enterprise' contained in § 1961(4) is incomplete because it does not tell us what that 'something' is (605 F.2d 265). . .The problem is thus to discover what the distinction might be for statutory purposes between simple 'patterns of racketeering activity,' which we think are outside RICO's purview, and a 'criminal enterprise' which the Government insists is within the ambit of the statute. Here the text is no help, for it does not

> even hint at what the standards should be for determining when racketeers have crossed the line to become a 'criminal enterprise." (605 F.2d 266).

In *Sutton*, The Panel observed that the Government had attempted to "finesse" the "enterprise problem" by urging that the appellants were a "group of individuals associated in fact" around numerous patterns of racketeering activity. Circuit Judge Merritt, writing for the Court, succinctly stated the Government's contention as follows:

> ". . .in the Government's view, the 'something' this group of individuals did to transform themselves into an 'enterprise' is provided by their racketeering activity. In short, appellants' enterprise was racketeering." (360 F.2d 265).

This argument the *Sutton* Panel refused to accept. Moreover, it specifically refused to countenance the Government's definition of a RICO "enterprise" as "an amoeba-like infra-structure that controls a secret criminal network." *United States v. Elliot*, 571 F.2d 880 (5th Cir. 1978). The *Sutton* Panel thus stated:

> "The language Congress did use makes it unlawful 'for any purpose employed by or associated with any enterprise. . .to conduct. . .such enterprise's affairs through a pattern of racketeering activity.' Surely, the draftsmen would not have opted for so complex a formulation if the legislative purpose had been merely to proscribe racketeering, without more. A straightforward prohibition against engaging in 'patterns of racketeering activity' would have sufficed, and there would have been no need for a reference to 'enterprises' of any sort. Although the Government reminds us that the Organized Crime Control Act of 1970 'is a carefully crafted piece of legislation,' *Iannelli v.*

United States, supra, 420 U.S. at 789, it would have us treat section 1962(c) as a purposeless circumlocution, written in terms of 'enterprises,' and persons 'employed' by them to conduct their 'affairs,' but in reality directed at anyone who commits two acts of racketeering. Under this construction an individual or a group who robs two banks 'for the purpose of making money' commits a RICO offense.

"Common sense, not to mention the first principle of statutory construction, leads us to reject the Government's reading and to seek a construction that gives some content to each element of the crime set forth in the text. The plain meaning of the words in context indicates that the reference to 'enterprise' was included to denote an entity larger than, and conceptually distinct from, any 'pattern of racketeering activity' through which the enterprise's 'affairs' might be conducted. If the 'enterprise' element of the crime is to have independent meaning, but is still to encompass 'criminal enterprises' as the Government contends, then a 'criminal enterprise' must involve something more than simply an individual or group engaged in a pattern of racketeering activity.

"In a passage which the Government urges us to follow, the Fifth Circuit describes a 'criminal enterprise' as 'an amoeba-like infra-structure that controls a secret criminal network.' *United States v. Elliot, supra*, 571 F.2d at 897-898. With all due respect, we think greater precision than that is required if the statute is not to violate 'first essential of due process of law' by forbidding 'the doing of an act in terms so vague that (persons) of common intelligence (would) necessarily (have to)

> guess at its meaning and differ as to its application.' *United States v. Culbert*, 435 U.S. 371, 374 (1978) quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Although government prosecutors may be trained nowadays to recognize an 'amoeba-like infra-structure' when they see one, our instincts are not so keenly developed, and we think even racketeers are entitled to know before the fact at what point their criminal activities will be deemed sufficiently 'amoeba-like' to transgress the statute." (605 F.2d 266).

In its well-reasoned and insightful opinion, the *Sutton* Panel enunciated the following definition of "enterprise" which, we submit, is the only interpretation consonant with the legislative intent and constitutional application of RICO:

> "We, therefore, hold that an 'enterprise' within the meaning of the statute is 'any individual, partnership, corporation, association. . .and any union or group of individuals associated in fact,' that is organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized. Section 1962(c) is violated whenever any person associated with such an enterprise conducts its 'affairs,' i.e., undertakes any activity on behalf of or relating to the purposes of the enterprise, by committing at least two criminal acts constituting a 'pattern of racketeering' as defined in § 1961(5)." (605 F.2d 270).

Having concluded that appellants were 'mere racketeers" whose acts were not shown to have been related in any way to the affairs of the "enterprise" as contemplated by RICO, the *Sutton* Panel reversed appellants' judgments of conviction. We urge a similar result herein for the reasons that follow:

As has been set forth more fully, *supra*, in the case at bar, the sole and exclusive proof offered by the Government to establish what it alleged was an "enterprise" within the purview of RICO was Picardo's glib assertions without more that he formed an "association." In the eyes of the Government, this "association" consisted of five defendants, plus three unindicted co-conspirators, plus four companies -- which concededly had absolutely no existence independent of the mere criminal concert of the alleged participants -- constituted a RICO "enterprise."

Lest there be any doubt whatsoever as to how the Government purportedly established the requisite "enterprise," we turn to the prosecutor's summation:

> "And what has he (Picardo) told you? He starts off saying he joins this group. He calls it an association. The judge later on will charge you that the law in this case and the indictment calls it an 'enterprise'." (A. 3517).[39]

In his charge, the District Judge cryptically addressed the "enterprise" requirement as follows:

> "An enterprise may consist of a combination of corporations and individuals, which are associated in fact although not a legal entity. To establish that the defendants were associated with the enterprise, the Government must show a connection between the defendants and the enterprise. The Government need not show that the defendants were associated with each component part of the enterprise but rather that they were associated with the enterprise as a whole.
>
> "The terms 'conduct' and 'participate in the conduct of' an enterprise include the performance of acts, functions, or duties which are necessary to or helpful in the operation of the enterprise. A person

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[39] Paragraph (g) of Count 1 of the Indictment denominated the "enterprise" charged herein.

> may be found to conduct or participate in the conduct of an enterprise even though he is a mere servant or employee having no part in the management or control of the enterprise and no share in the profits." (A. 3845).

Viewing the evidence in a light most favorable to the Government as we must, there was, therefore, absolutely no showing whatsoever that the petitioners' alleged acts of racketeering had the effect of subverting any legitimate institution, which as shown, quintessentially constitutes the *sine qua non* of a RICO violation. Indeed, despite the ranting of the prosecution that this case concerned "labor peace," as the Court of Appeals duly noted, the District Judge charged the jury that ". . .the Government does not contend that either Local 560 or Local 84 is the enterprise charged in this indictment" (A. 3854).

Since, as a matter of law, petitioners' alleged acts of racketeering were not shown to have been related in any way to the affairs of an "enterprise" as contemplated by § 1962(c), the substantive RICO violation must fall of its own weight. With it must fall the conspiracy count as well, since if, as herein, an illegal group allegedly engaged in racketeering activity wholly unrelated to any legitimate organization cannot constitute an "enterprise" within the contemplation of RICO, it similarly cannot constitute a "conspiracy" to conduct the affairs of an "enterprise" in violation of RICO.

In urging this Court to grant certiorari and to ultimately reverse petitioners' convictions, we are not unmindful that aside from the Third Circuit herein, five other Circuits have rejected the rationale of the *Sutton* Panel which we respectfully urge this Court to adopt.[40]

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[40] *United States v. Rone*, 598 F.2d 546 (9th Cir. 1979); *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

The common thread running through each of these respective cases is the notion that limiting RICO to the corruption of legitimate enterprises "does not make sense since it leaves a loophole for illegitimate business to escape its coverage," *United States v. Altese, supra*, 542 F.2d at 106-107. Noting, however, that to apply RICO to persons engaged in racketeering activity wholly unrelated to any legitimate organization but in furtherance of something the Government terms a "criminal enterprise" has the inevitable effect of "read(ing) the enterprise element entirely out of the statute,"the *Sutton* Panel remained unmoved by the holdings of other Circuits. Thus, Circuit Judge Merritt aptly observed;

> "It requires no great insight to recognize that applying the statute in this fashion renders the 'enterprise' element of the crime wholly redundant and transforms the statute into a simple proscription against 'patterns of racketeering activity.' Under the approach reflected in these cases, every 'pattern of racketeering activity' becomes an 'enterprise' whose affairs are conducted through the 'pattern of racketeering activity.' Plainly, that is not the statute Congress has written." (605 F.2d 265-266).

Although, as the *Sutton* Panel noted, the contention that RICO may not be properly applied to those who may have "merely" committed a series of racketeering offenses "lacks surface appeal," (605 F.2d 264) after careful analysis, it determined that consistent with its judicial function, it could not properly reject the cogent and telling argument made by the appellants. We ask this Court to hold likewise. Otherwise, it will be the law of this land that modest offenses[41] can be at

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[41] Indeed in the case at bar, the alleged criminal acts underlying the alleged "pattern of racketeering" constituted misdemeanors.

the merest whim of the Government, as here, transmuted into serious, federal felonies, despite the absence of even a scintilla of proof to establish the infiltration or corruption of any legitimate business which vice was the irrefutable concern of RICO and its *raison d'etre.*

Indeed, even where the expansive interpretation of "enterprise" urged by the Government has been adopted, the need has already arisen to caution prosecutors against utilizing RICO impermissively to aggrandize federal jurisdiction so as to multiply punishment for acts that have already been made criminally punishable by federal and state statutes other than RICO.

Thus for example, in *United States v. Huber*, 603 F.2d 387 (1979), the Second Circuit stated:

> "We note, however, that the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not previously intended. Therefore, we caution against undue prosecutorial zeal in involving RICO. We also emphasize to the district judges that when RICO is invoked, each set of facts must be evaluated independently." (p. 3930).

In the final analysis then, RICO focused upon the infiltration and corruption of legitimate business and was intended to proscribe infiltration and operation of legitimate enterprises through patterns of racketeering activity. In the instant case, the Government simply failed to establish, let alone beyond a reasonable doubt, that the petitioners were, in the language of Senator McClellan, operating 'illegitimately in legitimate channels." Given the Government's utter perversion of RICO, certiorari should be granted and petitioners' judgments of conviction should be reversed.

Conclusion

For the foregoing reasons, it is hereby submitted that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: July 17, 1980

APPENDICES

Appendix A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1912, 79-2381, 79-1956, 79-1913, and 79-2387

UNITED STATES OF AMERICA, *Appellee*

v.

ANTHONY PROVENZANO, STEPHEN ANDRETTA,
and THOMAS ANDRETTA, *Appellants*

Appeal From the United States District Court
For the District of New Jersey — Newark

(D.C. Crim. Nos. 79-00072-01, 79-00072-02,
and 79-00072-03)

Argued March 25, 1980

Before: ROSENN, GARTH and SLOVITER,
Circuit Judges

(Filed May 8, 1980)

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Appendix A

Opinion of United States Court of Appeals

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OPINION OF THE COURT

GARTH, *Circuit Judge*

In these consolidated appeals we are presented with challenges on numerous grounds to the convictions of Anthony Provenzano, Thomas Andretta, and Stephen Andretta under the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962.[1] The defendants[2] were convicted by a jury at a joint trial of conspiracy to violate RICO and of substantive violations, and were sentenced to prison terms and fined.[3] We have

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1. There are five appeals, as follows. Provenzano appeals his conviction at No. 79-1912 and denial of his new trial motion at No. 79-2381. Thomas Andretta appeals his conviction at No. 79-1913 and denial of his new trial motion at No. 79-2387. Stephen Andretta appeals his conviction at No. 79-1956.

2. A fourth defendant at the joint trial, Gabriel Briguglio, was also convicted, and has appealed as well. Briguglio's appeal, however, was severed and remanded on an unrelated point.

3. Provenzano and Thomas Andretta received 20-year terms; Stephen Andretta was sentenced to 10 years in prison. The former two were denied bail, *see United States v. Provenzano*, 605 F.2d 85 (3d Cir. 1979); Stephen Andretta is free on bail.

determined that the district court made no errors at trial which would warrant reversal, and we therefore affirm the judgment of the district court in all five appeals. In this opinion we will discuss briefly our resolution of the appellants' chief objections to the conduct of their trial.

I.

The facts of this case, as alleged in the indictment and found by the jury, revolve around a fairly complex labor kickback scenario. The Government's theory[4] is as follows:

Provenzano led a group consisting of himself, Thomas Andretta, Stephen Andretta, Gabriel Briguglio, and others, including Ralph Picardo, who was the Government's chief witness at trial. The group's aim was to extort money from trucking companies in return for "labor peace," inasmuch as Provenzano was allegedly able to control the International Brotherhood of Teamsters Union in New Jersey. The target in this case was a trucking company named Interocean Services, Inc. (Interocean), and later a successor company known as Di-Jub Leasing Corporation (Di-Jub). These companies were "in house" truckers for Seatrain Lines, Inc. (Seatrain), a large shipping company which shipped containerized freight that was ultimately trucked to its final destination.

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4. Because these are appeals from jury convictions, we must view the facts in a light most favorable to the Government. *See, e.g., United States v. Pratt*, 429 F.2d 690, 691 (3d Cir. 1970) (motion for acquittal).

Picardo had once been a truck driver and Teamsters member. Sometime after 1969, at Provenzano's direction, he switched to management and became a trucking manager, so that he could enable Provenzano, a Teamsters Union official, to be paid secretly for influencing union actions, in violation of 29 U.S.C. § 186.[5]

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5. 29 U.S.C. § 186 provides in relevant part:

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of any employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

[footnote continued on following page]

Picardo went to work for Seatrain. In 1969, Seatrain owned Interocean, which in turn owned Switching, Inc. Interocean, under Interstate Commerce Commission authority, did all necessary long-distance trucking for Seatrain; and Switching, not under ICC regulation, moved containers at or near Seatrain's piers. Interocean, many of whose officers had come from Seatrain, was not unionized, while Switching had a Teamsters Union contract.[6]

Sometime thereafter Picardo negotiated the "labor peace" deal with Interocean, specifically with Raymond Rosen, Interocean's vice-president. Picardo, the "front man" now operating a company, Cargo Truck Leasing (Cargo), supplied trucks and owner-operator drivers to

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(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 U.S.C. 301 et seq]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

6. The Government alleges that it was only through the appellants' influence that Interocean remained non-unionized, and that the purpose of Switching's union contract was twofold: to supply Picardo and another cohort with union pension and welfare benefits and to give Interocean sham evidence of unionization to dissipate suspicion. The Government also claims that Switching violated its union agreement by avoiding union fund contributions through the use of non-union owner-operators and that Stephen Andretta arranged a sham audit on behalf of the pension fund. Appellants dispute these allegations.

Interocean, thus enabling Interocean to avoid unionization and union obligations. In return, Interocean allowed Cargo to collect from Interocean for ghost drivers, *i.e.*, Cargo collected extra money for non-existent truck drivers who, of course, never performed work. This money was funneled to Picardo and his "associates," as he referred to the appellants at trial.

Among the actions charged by the Government, appellants ensured Picardo's continued dealings with Interocean (though Interocean feared Picardo would hijack its trucks) by threatening labor disruptions, and appellants extorted more money from Interocean in return for preventing the Longshoremen's Union from disputing the Teamsters Union's jurisdiction over movement of trucks within and around Seatrain's pier facilities. To guarantee Cargo's supply of drivers, appellants used their influence at Teamsters Local 560 in Union City, New Jersey, to send drivers to Cargo, where the drivers received low wages and no benefits, instead of sending them to union-organized terminals.

The illegally obtained money was distributed in various ways: checks to fictitious payees, chits, drawings on petty cash, salaries to a no-show worker, and fees for upkeep of horses of some of appellants' relatives. It was distributed either at a bar or at Local 560 in four shares: one-quarter to Provenzano and his brothers; one-quarter to Briguglio and his brothers; one-quarter to Thomas Andretta and Armand Faugno, who cashed checks; and one-quarter to Picardo. When Faugno "disappeared" in 1972, Stephen Andretta took his place and collected the monies previously paid to Faugno.

Overt links with Provenzano occurred in 1972 or 1973, when Picardo told him the details of the scheme and Provenzano complimented Picardo on it (A1072-73),

and when Picardo personally delivered cash to Provenzano in August 1974 (A1073-74, A1297, A1323-37).

The group next acquired control of Lift-Van Transport, a certified common carrier, and attempted to phase out Interocean and replace it with Lift-Van. Through appellants' influence, Lift-Van was able to refuse to renew its union contract and fire all union employees. When Picardo, Lift-Van's front man, was jailed for murder in 1975, his cohorts persuaded him to sell Lift-Van.

Appellants later set up the FLT Corporation to replace Cargo. Thomas Andretta, who ostensibly ran FLT, was in prison at all relevant times.

The dispatchers of Interocean who knew of the ghosting scheme were paid to add the names of the "ghosts" and to keep quiet.[7] When an Interocean auditor discovered a salary being paid to a no-show employee, he was told by Rosen and the employee it was not his business. When the auditor discovered the ghosting scheme, Rosen told him the false billings were just overcharges, which Cargo would be asked to repay. The scheme was uncovered when Picardo agreed to cooperate with the Government.

II.

These appeals present fifteen issues, some of which are raised by all appellants, and some of which affect only one of the three.

A. Issues Common to All Appellants

1. *RICO or Larceny?*

Appellants assert that there was a variance between the indictment and the proofs at trial, *i.e.*, that the indictment charged a RICO violation, while the proof showed

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7. Appellants allege that the payments were made to keep them from telling Seatrain or higher Interocean officials.

only larceny. A RICO violation required proof that Interocean, or later Di-Jub, bribed members of appellants' group in order to secure labor peace. These bribes constitute the racketeering required by the RICO Act. 18 U.S.C. § 1962,[8] because these debts are unlawful

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8. 18 U.S.C. § 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

under 29 U.S.C. § 186. Proof of bribery requires knowledge on the part of the party giving the bribe. The appellants contend that the Government failed to prove that anyone at Interocean or Di-Jub knew of Picardo's and Cargo's ghosting scheme, and therefore at best the Government proved that Picardo, who asserted that he was getting money to provide labor peace, was actually just stealing from Interocean.

Appellants point to testimony of Rosen, Interocean's vice-president, to the effect that he did not know of Picardo's ghosting operations (A2217, A2295).[9] In addition, two Interocean dispatchers testified to receiving bribes from Picardo; only one, however, said that he suspected that the purpose for the bribe was that he conceal the ghosting from his Interocean superiors (A1883). The auditor who discovered the ghosting testified that Rosen told him Cargo would have to pay back the overcharges and that in fact Cargo did pay them back (A1945).

On the other hand, Picardo testified to conversations with Rosen, during which he claimed to have discussed the specifics of the scheme with Rosen (A1004, A1029, A1039-40). Picardo also testified that the payments were made (A1052). In addition, Rosen's telling the auditor that the discrepancies were none of his business (A1935-36) and a memorandum revealing that Interocean had to guarantee money for labor peace (A2117-18) both support the Government's theory. With respect to the bribes paid by Picardo to the dispatchers, Alan Abramowitz, an employee of Picardo at Cargo, testified that he never told anyone the money had been paid

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9. The only ghosting to which Rosen admitted of being aware was a separate scheme whereby Interocean overcharged Seatrain to make up deficits incurred by undercharging customers, thereby enabling Seatrain indirectly to grant illegal rebates to those customers.

to keep the dispatchers quiet, but he then admitted, upon being confronted with a writing, that he had once told an FBI agent that he believed that the monies had been paid for this purpose (A1853). He never specified from whom the secret was to be kept. Both dispatchers testified they were paid to add the "ghosts" to the list (A1863, A1881). Only one ambivalently suggested that he was paid not to tell his superiors (A1883). In any event, even if Rosen knew of the scheme, Picardo could reasonably have bribed the dispatchers to keep quiet and not spread the word to anyone, so as to conceal from them Rosen's knowledge and thereby avoid the dispatchers' knowing of and revealing the extent of the scheme.

The jury apparently believed Picardo's testimony that he had informed Rosen of the scheme and that Rosen, on behalf of Interocean, bribed Picardo's group, thus involving the group in a RICO violation. Under the applicable standard of review, *see, e.g., United States v. Hamilton*, 457 F.2d 95, 98-99 (3d Cir. 1972), this jury verdict of guilty must stand because there was sufficient evidence for the jury to find beyond a reasonable doubt that Rosen had knowledge of the scheme and bribed Picardo's group. Thus, there was properly proved a valid RICO-type violation, as opposed to mere grand larceny.

2. *"Enterprise"*

Appellants acknowledge that the prevailing statutory interpretation in most of the Circuits brings them and their association within the meaning of the RICO statute's requirement of an "enterprise," as defined in 18 U.S.C. § 1961(4):

> "[E]nterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . .

Yet appellants argue that their association is not an "enterprise" because it had no legitimate purpose. They argue that the legislative history of RICO indicates a desire to prevent infiltration of legitimate business, and therefore all offenses — like those alleged here — not involving a legitimate business should be prosecuted under other pre-existing criminal laws. Otherwise, they argue, the complex RICO statute would have been unnecessary.

Five Circuits have rejected this argument and have concluded that even an association formed for the sole purpose of illegal racketeering can satisfy the "enterprise" requirement. *E.g., United States v. Rone*, 598 F.2d 564 (9th Cir. 1979); *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). Only the Sixth Circuit, in a divided panel opinion later vacated for rehearing en banc, has suggested it would follow appellants' theory. *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *vacated and rehearing en banc granted*, Nos. 78-5134 to -5139, -5141, -5143 (6th Cir. Nov. 7, 979) (rehearing held Apr. 2, 1980).

We have previously held that RICO is to be construed liberally. *United States v. Forsythe*, 560 F.2d 1127, 1135-36 (3d Cir. 1977). And in *United States v. Frumento*, 563 F.2d 1083, 1089-92 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978), this court held that the word "enterprise" was broader than a private business or a union, and included a state agency. But we need not go so far as to adopt generally either the narrow or the broad definition of "enterprise" in this case. The purpose of

RICO — prevention of infiltration of legitimate business by racketeers — would in any event be vindicated by the convictions here, since the wholly illegitimate Provenzano association subverted legitimate unions and businesses, although the Government did not allege that any union local was the "enterprise" (A3854 — jury charge). We decline in this case to construe the RICO statute so as to allow the appellants a defense that they made sure *not* to engage in any *legal* activity.

3. *Picardo's Testimony About Use of Fear and Intimidation*

Appellants assert that their convictions must be reversed because the jury heard Picardo testify to other wrongs that the appellants committed, specifically loan-sharking and gambling (A958); to appellants' use of fear and intimidation (A1000); to their threatening Picardo should he fail to deliver on his obligations (A1090); to their fixing of horse races (A1114); and to their threatening to kill Picardo in jail (A1759). The district court admonished Picardo against testifying about appellants' other wrongs, and twice even the Government was surprised by Picardo's responses (A966 — loan-sharking and gambling; A1115 — fixing of horse races), and disclaimed any attempt to prove them.

Of course, evidence of such alleged criminal activity is not admissible to prove that the appellants were guilty of the crimes charged. Fed. R. Evid. 404(b). Nevertheless, evidence of other crimes is admissible for other purposes, such as to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," *id.* Although the Government never attempted to justify introduction of appellants' other wrongs on any of these grounds when appellants objected, and the district court did not explain its reasons for admitting the

testimony, such a specification is not neccessary, as long as the statements were in fact admissible. *See United States v. Rosenstein*, 474 F.2d 705, 711-13 (2d Cir. 1973) (appellate court may affirm admission of evidence on ground never urged or decided in trial court, as long as evidence is admissible under ground relied on by appellate court for same purpose for which it was admitted by trial court);[10] *cf. PAAC v. Rizzo*, 502 F.2d 306, 308 & n.1 (3d Cir. 1974) (appellate court may affirm correct decision on ground not relied upon by district court), *cert. denied*, 419 U.S. 1108 (1975).

Evidence of the use or intended use of fear and intimidation to control the piers (A1000) was relevant to show both the opportunity to carry out the scheme and the plan of how to carry out the scheme. Picardo's testimony as to his fears of reprisals by the others should he fail to come up with the money (A1090) was relevant to show both knowledge of the others and how the others controlled Picardo's role (plan), as opposed to the defense

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10. Thus, in *Rosenstein*, the Second Circuit affirmed the admission of evidence on the basis of the nonhearsay character of statements of coconspirators in furtherance of the conspiracy, while the trial court had erroneously relied on the business records exception to the hearsay rule. Both grounds allowed introduction of the evidence for the same purpose — to establish the truth of what is said — without different or limiting instructions to the jury. *Rosenstein* distinguished *Shepard v. United States*, 290 U.S. 96 (1933), and *United States v. DiMasi*, 445 F.2d 251 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971), as cases where erroneous plenary admission of hearsay could not be justified by the more limited theory of proof of the declarant's state of mind. *See* 474 F.2d at 710-11. In the present case, whether Picardo's testimony was admissible as being directly relevant or was admissible to prove such things as plan or opportunity of the Provenzano group to control the scheme, it was admissible for the same purpose, *i.e.*, to prove the truth of what it said. Thus, under *Rosenstein*, the rule 404(b) ground might validly support the admission of Picardo's testimony.

theory that the entire operation was merely a larceny of Picardo's own doing. Evidence of the death threat Stephen Andretta made to Picardo while Picardo was incarcerated (A1758-59) was relevant to show how the others controlled Picardo's role (plan), to the extent that they forced him to sell Litt-Van when he, being incarcerated, could no longer operate it. Moreover, defense counsel had already elicited from Picardo on cross-examination that he was angry during his incarceration at Stephen Andretta (for reasons defense counsel would not let Picardo explain) (A1611-13), and that Picardo had already told an FBI agent that Stephen Andretta had made (unspecified) threats to him (A1669). Defense counsel had thus cast doubts on Picardo's credibility, and evidence of the reason for his anger at Stephen — *i.e.*, one-time death threat should Picardo not follow orders — was independently relevant to rebut or explain Picardo's motive to lie against his associates, as might be suggested by a general anger at their not helping him out of jail over a long period. Finally, defense counsel had already elicited the fact that Stephen Andretta had threatened Picardo in some way; so the elucidation of the precise nature of the threat was, on balance, not prejudicial.[11]

Some of Picardo's answers, however, *i.e.*, those relating first to loan-sharking and gambling, and second to the fixing of horse races, were clearly irrelevant for any purpose. When Picardo gave these answers, the court

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11. Fed. R. Evid. 403, requiring exclusion of evidence the district court finds to be more unfairly prejudicial than it is probative, apparently never was invoked at trial. We will therefore presume that the district court performed the appropriate balancing, *United States v. Long*, 574 F.2d 761, 766 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978). As the analysis above illustrates, the district court's decision to admit the testimony was not an abuse of discretion.

promptly told the jury to disregard the testimony (A958-59, A1119). Moreover, in the charge to the jury, the district court again stated that they must disregard questions and answers, objections to which were sustained (A3800). In each instance, the prosecutor claimed that he had not expected such answers, and that he had told Picardo to avoid inserting extraneous matters (A966, A1114-16). Both responses came after questions that were designed to elicit other information.

As to the first, the Assistant United States Attorney asked Picardo to identify the types of businesses in which the associaton, Picardo and the appellants, engaged, expecting Picardo to reply that only trucking was involved. Instead, Picardo answered, "Trucking, loan-sharking, gambling" (958). As to the second, Picardo had previously testified that " North Jersey Feed Company was for the purpose of getting into the race track and to be able to tranquilize horses and fix races" (1114). The Assistant United States Attorey then asked whether Picardo had involved his associates with that business, expecting Picardo to explain that his "associates" were *not* involved, and that, on the contrary, it was Picardo's way to siphon money secretly from them (A1114-15). Instead, Picardo answered that he had involved his associates with North Jersey Feed Company (A1114).

Under these circumstances, we cannot say that the unsolicited references to loan-sharking, gambling, and the fixing of horse races were so inflammatory or prejudicial that they could not be cured by jury instructions. which, as noted, were given. We therefore conclude that defendants were not prejudiced. Nor do we think that this case falls within the rule of *Government of Virgin Islands v. Toto*, 529 F.2d 278 (3d Cir. 1976), requiring reversal despite the district court's striking of the testimony.

The testimony here was not of other convictions, but rather consisted of an offhand mention that the appellants were also involved peripherally in other common illegal activities. Given the long and complex descriptions of the RICO violations, we are satisfied that the causal mention of others did not constitute reversible error.

4. *Picardo's Unsolicited Comments*

Picardo defied the district court's warnings and conversed with marshals while sidebars were being held in another room. Although these conversations took place within sight of the jury, they did not take place within the jurors' hearing. The jurors all denied hearing anything, except for one alternate juror (who ended up being dismissed with the others at the end of the summations), who "heard him [Picardo] say something about somebody's wife" (A974). We cannot say that this conduct, albeit in disregard of the district court's ruling, requires reversal.

5. *Pretrial Publicity*

Appellants claim that certain jurors were impaneled when they should have been removed for cause for lack of impartiality. The crux of the problem was pretrial publicity about Provenzano. The appellants argue that either many veniremen should have been excused for cause, or jurors should have been chosen from a different vicinage, or Provenzano's trial should have been severed.[12] Appellants claim prejudice in two ways: first, that biased jurors decided the case, and, second, that appellants were prejudiced by the failure of the district court to excuse other veniremen for cause, forcing appellants to waste peremptory challenges to excuse them, *see United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976); *cf.*

12. The last alternative would have satisfied Thomas and Stephen Andretta but not Provenzano.

Swain v. Alabama, 380 U.S. 202, 219 (1965) (denial or impairment of right to use peremptory challenges, once given, is reversible error).

The constitutional standard for dismissal of veniremen was set forth in *Murphy v. Florida*, 421 U.S. 794 (1975). Pretrial publicity exposure will not automatically taint a juror. Even if the juror has heard of or about the case and of the allegations of a defendant's guilt, he may sit if he is still capable of abandoning his prior impressions and rendering a fair verdict on the evidence. A juror's own assurance of this is not the final determinant, but the accused has the burden of proof to demonstrate that the juror is partial. *See id.* at 799-800. Prejudice is to be presumed only in cases where "the influence of the news media. . .pervaded the proceedings" *id.* at 799. Examples the Court gave include a trial where pretrial publicity consisted of showing a twenty-minute confession three times on television, *Rideau v. Louisiana*, 373 U.S. 723 (1963), and a trial where cumbersome television equipment invaded the courtroom, *Estes v. Texas*, 381 U.S. 532 (1965).[13]

But in the *federal* courts, *Murphy* affirms that the stricter rule of *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam), and *United States ex rel. Doggett v.*

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13. *Cf. Turner v. Louisiana*, 379 U.S. 466 (1965) (key prosecution witnesses acting as juror attendants throughout trial).

Yeager, 472 F.2d 229 (3d Cir. 1973), [14] still governs, as a matter of supervisory authority. In federal cases, therefore, jurors are to be dismissed on less of a showing of actual prejudice than that required by *Murphy*.

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14. In *Marshall*, the court reversed the defendant's conviction where seven jurors had seen one or both of two newspaper articles describing how the defendant, on trial for unlawful distribution of prescription drugs, had previously practiced law without a license, even though the jurors averred that they would not be and had not been influenced by the articles. In *Doggett* the publicity occurred during trial and consisted of newspaper items indicating that Doggett had retracted a guilty plea and had attempted to escape. The court described the case:

> The record discloses that the trial court did admonish the jurors not to read or pay attention to anything about the case appearing in the newspapers. It also discloses that despite this admonition some jurors, at least, certainly disregarded it.
>
> Thus, we have before us a case in which prior to the commencement of a trial, counsel, anticipating adverse newspaper accounts, requested an adjournment; where during the trial highly prejudicial newspaper accounts did in fact circulate in the small community in which the trial was being held; where it was established that at least two of the unsequestered jurors had read the highly prejudicial newspaper accounts despite an admonition not to do so; where an examination as to whether others had also disregarded the admonition was made *en banc* rather than individually; where no inquiry was made as to whether the two jurors who concededly read the prejudicial newspaper accounts discussed them with others; where an additional page one prejudicial newspaper account circulated in the same small community in the vicinity of the unsequestered jury; where the court would not even permit inquiry respecting exposure of the jurors to the later newspaper account although the jurors had access to the newspaper in question; and where the defendant's position was at all times after the first newspaper account appeared urged upon the court by timely motions for a mistrial and a continuance.

472 F.2d 233-34. *Doggett* involved review of a state trial but this court at that time applied the *Marshall* standard to state cases as well. This was rejected in *Murphy*, *see* 421 U.S. at 797.

We have examined the record and have conducted an independent review of the circumstances alleged to constitute pretrial publicity in this case. *See United States v. D'Andrea*, 495 F.2d 1170 n.5 (3d Cir.), *cert. denied*, 419 U.S. 855 (1974). We have concluded, first, that the publicity in this case was not presumptively prejudicial as a matter of law, in contrast to that involved in cases like *Rideau*, and, second, that the "substantial prejudice" required by *D'Andrea* has not been demonstrated. Most of the pretrial knowledge in the present case consisted either of reports that the jury would be selected that day or of a panel member's having heard mere mention in the news of such terms as "Mafia," "unions," "gangster," "Tony Pro" (Provenzano's nickname), "organized crime," or "kickbacks" in connection with the case. No panel member indicated any belief in this type of generalized innuendo, and each assured the district judge in response to a series of five to ten searching questions that he or she would decide the case strictly on the evidence and on the law as explained by the judge and would not be influenced by publicity. In light of the record in this case, the district court did not err in not excusing certain challenged veniremen for cause.[15]

6. *Juror Misconduct*

The jury in this case was sequestered. Toward the end of the trial, at about 3:00 a.m., a marshal discovered a juror and two alternate jurors smoking marijuana, and reported the incident to the district judge, who informed counsel. The district court suggested that no action be

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15. In addition, as to some veniremen, objections were waived by failure to challenge for cause. *See, e.g., United States v. Cepeda Penes*, 577 F.2d 754, 759 (1st Cir. 1978); *United States Hawkins*, 566 F.2d 1006, 1013 (5th Cir.), *cert. denied*, 439 U.S. 848 (1978); *cf. Davis v. United States*, 411 U.S. 233 (1973) (waiver of objection to composition of grand jury).

taken; defense counsel, after conferring among themselves, agreed but suggested in addition that the district judge tell the offenders not to be concerned about the incident, and that they would not be prosecuted. The district judge did as counsel requested. None of the appellants were personally present at the conference when counsel were informed of the incident; in fact none found out about it until after trial.

Appellants now challenge the course of conduct chosen by the district court, claiming that he should have dismissed the offenders *sua sponte* without soliciting or accepting counsel's advice. We disagree. We see no reason to depart from the longstanding rule that counsel's intentional tactical decisions at trial bind his client. For the same reason, the district court did not err in denying appellants' motion for a new trial on the ground of untimeliness, since counsel, even if not appellants, knew of the incident before, so it was not newly discovered evidence, and the motion was not made within seven days after trial. Under *United States v. Bujese*, 371 F.2d 120, 125 (3d Cir. 1967), "evidence is not 'newly discovered' when it was known or could have been known by the diligence of the defendant or his counsel."

Even if we were convinced that appellants had not waived objection to the district court's failure to excuse the offending jurors, we do not think that the smoking of marijuana by one juror and two alternates warrants reversal in the instant circumstances. While possession of marijuana is illegal under both federal and state law, 21 U.S.C. § 844, N.J. Stat. Ann. § 24:21-20, since none of the offending jurors were ever charged or convicted, they would not be disqualified from service under 28

U.S.C. § 1865(b)(5).[16] And without engaging in extended philosophical discussion of where we might draw a line in a proper case, we hold as well that the public knowledge that sitting jurors were smoking marijuana does not create such an appearance of impropriety as to warrant reversal of convictions where the jurors were not dismissed. Nor is there any serious contention that the drug's intoxicating effect affected the jurors' ability to hear evidence or to deliberate. No one suggested this to be the case the following day at trial, and the district judge later observed, when denying the new trial motion, that the jurors had not been "in any way impaired from functioning as such" (Joint Supp. App. at SA58-59). The modern view is that the consumption of alcohol is not prejudicial as a matter of law, see, *e.g., Kealoha v. Tanaka*, 45 Hawaii 457, 470-74, 370 P.2d 468, 475-77 (1962), and appellants have not demonstrated prejudice, as required by cases such as *United States v. Taliaferro*, 558 F.2d 724, 726 (4th Cir. 1977), *cert. denied*, 434 U.S. 1016 (1978), and *United States v. Klee*, 494 F.2d 394, 395-96 (9th Cir.) (premature discussion of case among jurors), *cert. denied*, 419 U.S. 835 (1974).

Finally, we reject as sheer speculation appellants' contention that the jurors, who were told not to worry

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16. 28 U.S.C. § 1865 describes the method of juror selection and qualification. Subsection (b)(5) provides:

> (b) In making such determination the chief judge of the district court, or such other district court as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he —
>
> * * *
>
> (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.

about prosecution, must thereby have felt indebted to the Government and accordingly felt compelled to vote to convict out of fear of retaliation by the Government Moreover, it was defense counsel who insisted on the judge's assuring the jurors that they would not be prosecuted *lest* they favor the Government out of fear of prosecution (Joint Supp. App. at SA117-18).

7. *Absence of Appellants at Conference Discussing Incident*

Appellants claim that their rights were prejudiced by their not being included in the conference regarding marijuana smoking by jurors. They now claim they would have influenced counsel to ask for disqualification of the jurors.

It is clear that there is no *constitutional* right for a defendant to be present at a conference in chambers concerning dismissal of a juror. *See United States v. Brown*, 571 F.2d 980, 986-87 (6th Cir. 1978); *United States v. Howell*, 514 F.2d 710, 714 (5th Cir.), *cert. denied*, 423 U.S. 914, 987 (1975); *United States v. Baca*, 494 F.2d 424, 428-29 (10th Cir. 1974); *Ellis v. Oklahoma*, 430 F.2d 1352, 1354-56 (10th Cir. 1970) (habeas corpus motion following state trial), *cert. denied*, 401 U.S. 1010 (1971). What remains is a question of the interpretation of Fed. R. Crim. P. 43. Subdivision (a) states:

> The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

On the other hand, subdivision (c)(3) provides:

> A defendant need not be present. . .[a]t a conference or argument upon a question of law.

We hold that reversal in this case is not required by rule 43 for three reasons. First, any objection to appellants' nonpresence at the conference was waived by counsel's failure to object contemporaneously. *See United States v. Brown*, 571 F.2d at 987.[17] Second, despite the holdings of that case and *United States v. Baca, Supra*, we believe that the district court correctly held that under rule 43(c)(3) the appellants had no right to be present at the conference. The facts were undisputed, and the conference concerned only a question of law: whether, on the facts, dismissal of the offenders was compelled. We have already held that the district court had discretion to retain or dismiss the jurors. In the exercise of that discretion, he left this decision up to the defense counsel. Counsel themselves made the tactical choice to place their clients' fate in the hands of the jury which included one of the offending jurors, rather than in the hands of the particular alternate who would be called as a replacement.[18]

Third, even if rule 43(a) required appellants' presence at this stage of the trial, *see, e.g., United States v. Brown*, 571 F.2d at 986, this rule is subject to the harmless error doctrine, *see id.* at 987. Examination of the record reveals that counsel vigorously safeguarded appellants' interests, to the extent of insisting on procedures they — counsel — thought would yield the best chance for acquittal. It is fanciful for appellants to suggest *post*

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17. In *United States v. Brown*, at least one defendant was present at the conference and knew of the problem. Counsel in the present case did not inform appellants of the conference until after trial, although nothing prohibited them from doing so (Joint Supp. App. at SA113-14, SA119). We do not think that this changes the analysis significantly.

18. The alternate who would replace the dismissed juror was identified and known to defense counsel (Joint Supp. App. at SA41, SA81-82, SA101).

hoc that they would have demanded replacement of the offending juror had they been present at the conference. Therefore, any error in the district court's failure to dismiss the offenders *sua sponte* was harmless beyond a reasonable doubt and as such will not warrant reversal.

8. *Jury Charge*

The appellants contend that the jury charge was erroneous insofar as it allowed the jury to convict them under RICO so long as the payee or recipient of the illegal payment was a member of the conspiracy, even if the payee or recipient was not a union agent, officer, or employee. We do not agree. A reading of the relevant portion of the jury charge as a whole (A3933-35) clearly shows that the district court correctly instructed the jury that the payee or recipient must be *both* a union agent, officer, or employee, *and* at that time a member of the conspiracy, indicted or unindicted.

9. *Testimony Read Back to Jury*

During their deliberations, the jury requested that some testimony be reread to them. The district court reread the direct testimony of one witness and was about to go on to the testimony of the next witness when defense counsel reminded him to include the first witness' cross-examination (A3894). The judge immediately corrected his oversight, and no objection was made by counsel. Appellants' claim now that this constituted plain error is clearly frivolous.

In addition, appellants point out that some requested testimony was never read back to the jury. This, as well, was not an abuse of discretion. Only after the rereading had apparently been concluded and the jury had again been excused did defense counsel claim that two additional questions and answers were within the jury's

request (A3991-92); no objection had previously been made to the portions selected for rereading. Moreover, the district court properly recognized that the two questions and answers were merely cumulative of other testimony of the same witness that had been read back. Therefore, there was no error in the refusal to recall the jury for a rereading of two more questions and answers.

B. *Provenzano Issues*

1. *Evidence of Provenzano's Participation in the Conspiracy*

The evidence of Provenzano's participation in the conspiracy must be considered in the light most favorable to the Government on review of the jury's guilty verdict. *E.G., United States v. Schoenhut*, 576 F.2d 1010, 1014 (3d Cir.), *cert. denied*, 439 U.S. 964 (1978); *United States v. Pratt*, 429 F.2d 690, 691 (3d Cir. 1970). Similarly, the evidence must be so viewed in reviewing the district judge's determination (A3344-47) of proof of Provenzano's participation by a preponderance of evidence independent of coconspirator statements, *e.g., United States v. Trotter*, 529 F.2d 806, 811-12 (3d Cir. 1976); *United States v. Bey*, 437 F.2d 188, 191 (3d Cir. 1971), upon which was predicated the admission of coconspirators' statements, under Fed. R. Evid. 801(d)(2)(E). *See, e.g., United States v. Trowery*, 542 F.2d 623, 626-27 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977). The necessary quantum of evidence has been characterized as "some," *Schoenhut*, 576 F.2d at 1027, and "slight," *United States v. Fried*, 576 F.2d 787, 793 (9th Cir.), *cert. denied*, 439 U.S. 895 (1978). What must be shown is Provenzano's *participation* in the conspiracy, *i.e. agreement*, as opposed to mere knowledge thereof or approval, but from a showing of

knowledge plus actions taken in furtherance of the conspiracy, the jury may infer the necessary agreement. *United States v. Klein*, 515 F.2d 751, 753 (3d Cir. 1975).

The only direct proof of Provenzano's participation in the conspiracy came from Picardo's testimony. Provenzano attempts to dismiss Picardo as a biased liar, Provenzano brief at 30, but, of course, Picardo's statements must be accepted as true for the purpose of determining the sufficiency of evidence.

Picardo testified that he told Provenzano exactly how the operation was running, that Provenzano approved, and that Provenzano was paid from that operation:

> Q. [MR. SPEISER, Assistant U.S. Attorney].
>
> Now, did you ever have a personal conversation with Mr. Provenzano about this operation you were running with Interocean?
>
> A. [PICARDO]. Yes, I did.
>
> Q. What did you tell him?
>
> A. I told him exactly what we were doing, the method we were using, and he complimented me on the successful type of operation.
>
> MR. GOLDBERG [Provenzano Counsel]: Judge, can I have a date? Is that '73?
>
> THE COURT: What date was it?
>
> THE WITNESS: I don't know the exact date, your Honor.
>
> MR. GOLDBERG: The month?
>
> THE COURT: Do you know the year?
>
> THE WITNESS: I would say '73.
>
> MR. GOLDBERG: Thank you.
>
> THE WITNESS: Or late '72.
>
> Q. Did you ever personally give Mr. Tony Provenzano any of the proceeds of this ghosting operation?

A. I think in one occasion I did personally.
Q. Do you recall when that was?
A. Could you give me a minute to think about that one?
Q. Yes.
A. Sometime in 1973.

(A1072-73). Picardo also testified just before this colloquy that Provenzano received a share (A1072), and received cash proceeds, either directly or through others (A1090). *See Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (stake in venture relevant to participation in conspiracy). Picardo testified that Provenzano contributed capital to Lift Van, part of the operation of which was illegal, and that the illegal intent — "[t]o monopolize the industry, not to have a union contract so we could give suppressed rates and get all the lucrative business from the major steamship lines" — was discussed with his "associates" (A1176-77). Picardo testified that Provenzano was interested in the status of Lift Van and was "the boss" who decided that Picardo should acquire Lift Van (A1155-57).

From the above evidence, the district judge could have concluded by a preponderance, and the jury could have found beyond a reasonable doubt, that Provenzano knew of the scheme, contributed money to it, approved of it, and therefore was a participant. Provenzano argues that not all of Picardo's Cargo and Lift Van operations were totally illegal,[19] so that Provenzano's approval and participation in contributions and profits may have gone to the legal aspects. This may be so, but the judge and jury were entitled to draw the opposite inference, particularly since the thrust of Picardo's testimony was that

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19. We note that this line of argument conflicts with the appellants' contention that their operations could not be a RICO "enterprise" because they were wholly illegitimate, *see ante* at 10-11.

Provenzano's participation and interest were with respect to the illegal aspects of the operation, *i.e.*, "ghosting."

Picardo also testified that he used illegal profits at Provenzano's direction to pay bills for the upkeep of Provenzano's daughter's riding horse (A1120-23). Provenzano argues that this is proof only of association and not participation, but the judge and the jury were entitled to infer that Provenzano was doing something to aid the conspiracy, or at the least, he was a part of it so as to entitle him to profit from it.

Although the evidence is not overwhelming, and while it comes from only one witness whose veracity was certainly open to question, it was sufficient to establish a conspiracy and to tie Provenzano to that conspiracy.

2. *Admission of Picardo's Statements Under the Coconspirator Hearsay Exception*

At issue here is the testimony of Paulette Compton and Mary Ann Hart, Picardo's paramours, and of Alan Abramowitz, an employee of Picardo, who were allowed, over objections, to testify to statements Picardo made to them about Provenzano and his role in the illegal operations. The statements were admitted under Fed. R. Evid. 801(d)(2)(E):

> (d) *Statements which are not hearsay.* — A statement is not hearsay if —
>
> * * *
>
> (2) *Admission by party-opponent.* — The statement is offered against a party and is. . .(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Provenzano argues that Picardo's statements as related by Compton, Hart, and Abramowitz were not made in furtherance of the conspiracy, even assuming the existence of a conspiracy which included Picardo and

Provenzano. Specifically, Provenzano objects to Compton's testimony about Picardo's telling of Provenzano's role in his, Picardo's, affairs, the claim that FLT was a sham, and how Lift Van was capitalized (A2460-71), and to Hart's statements about Picardo's high regard for Provenzano (A2635), how Lift Van was financed (A2642), and how Picardo traveled to Florida on Provenzano's orders (A2648).

Provenzano admits that when Picardo went to jail in 1975, Picardo had Compton run the business for him. Provenzano also admits that both Hart and Abramowitz worked for the business. The district court was entitled to decide that what Picardo told Compton was in furtherance of the conspiracy because he knew he would need someone to run the company if he went to jail. As Compton testified, Picardo gave her a power of attorney when he went to jail because "I [Compton] had been running the office, basically, while he was on trial and he had no one else to take care of the business and I just took over" (A2475). If Compton were to run the business, she had to know all the details, and therefore, Picardo's telling her the sordid details was in furtherance of the conspiracy. While the admissibility of Compton's testimony is a close question, we will not disturb the district court's finding that the statements of Picardo were in furtherance of the conspiracy. *See United States v. Trotter*, 529 F.2d 806, 813 (3d Cir. 1976) (approving a broad construction of the "in furtherance of" requirement).

No findings, however, apparently were made with respect to whether the statements of Picardo to which Hart and Abramowitz testified were "in furtherance of" the conspiracy. The district court said only, "I don't understand the objection. If Mr. Picardo is saying things that purportedly refer to the conspiracy, to his employees,

then it's an act of a co-conspirator" (A2335-36). This misconstrues the "in furtherance of" requirement. Only if there was a reason for Hart or Abramowitz to know these things about the conspiracy could the statements have been "in furtherance of" the conspiracy. At best, Hart and Abramowitz were Picardo's errand runners. The district court made no findings, and the Government has pointed to no evidence indicating that anything Picardo told them could have furthered the conspiracy.

Nevertheless, the testimony was admissible to rebut a claim of recent fabrication under Fed. R. Evid. 801(d)(1)(B):

> (d) *Statements which are not hearsay.* — A statement is not hearsay if —
>
> (1) *Prior statement by witness.* — The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is. . .(B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . .

Thus, the statements of Picardo to Compton, Hart, and Abramowitz were consistent with Picardo's statements at trial, where he was available for cross-examination, and are relevant to rebut the defense claim — express or implied — that Picardo was lying against all the defendants in return for benefits from the Government. Evidence was before the jury with respect to Picardo's 1975 murder conviction (A1216-18), as well as the fact that Picardo was in prison (*id.*), and the fact that Picardo was released from the state prison with the aid of the federal government in return for his cooperation in the

Provenzano case (A1224-30, A1505-06),[20] and has since escaped from a federal prison but has never been prosecuted (A3479-83, A3489).

Under these circumstances, the testimony of Compton, Hart, and Abramowitz — that *prior to his 1975 murder conviction*, Picardo told them about his association with Provenzano and about the illegalities of the business — was highly probative to rebut the defense claim, which at least was implied, that Picardo fabricated the whole conspiracy so as to remove himself from prison and take revenge on the appellants, particularly Stephen Andretta, for failing to help him out. *See, e.g., United States v. Knuckles*, 581 F.2d 305, 313-14 (2d Cir.) (recordings, in furtherance of conspiracy, also admissible to rebut charge of falsification, since they predated the suggested motive for falsification — *i.e.* to gain favor with prosecution), *cert. denied*, 439 U.S. 986 (1978); *United States v. Allen*, 579 F.2d 531, 532-33 (9th Cir.) (Government may rebut implied charge of recent fabrication even where such charge is suggested by evidence introduced by Government for another purpose, as long as Government did not introduce suggestion of falsification merely to enable it to bolster case with prior consistent statement), *cert. denied*, 439 U.S. 933 (1978).

The testimony of Compton, Hart, and Abramowitz was admissible, at least to rebut a fabrication claim, and the district court's evidentiary ruling may be affirmed on this alternative ground. *See, e.g., United States v. Rosenstein*, 474 F.2d 705, 711-13 (2d Cir. 1973) (affirm-

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20. Some evidence of Picardo's deal with the federal government was introduced on cross-examination, by Provenzano's lawyer, who raised the issue of Picardo's bias or motive (A1506-07).

ance of admissibility on appeal based on coconspirator rule, never discussed by trial court).[21]

3. *Admissibility of Provenzano's Prior Convictions*

Provenzano has previously been convicted of murder; of extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, *see United States v. Provenzano*, 334 F.2d 678 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964); and of conspiracy involving kickbacks in violation of 18 U.S.C. § 1954, a conviction currently on appeal before the Second Circuit.

Provenzano desired to testify on his own behalf and therefore moved *in limine* for a ruling as to whether these prior convictions would be admissible to impeach him under Fed. R. Evid. 609:

> (a) *General rule.* — For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
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> * * *

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21. Evidence admitted under rule 801(d)(1)(B), while conditioned upon the need to rebut a charge of fabrication, may be used by the jury for any substantive purpose to establish the truth of what it says. Fed. R. Evid. 801(d)(1)(B), Advisory Comm. Note. Thus, both grounds for admitting the evidence are equally broad, and the district court's ruling may be affirmed under *Rosenstein*. *See* note 8 *supra*.

> (e) *Pendency of appeal.* — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

The district court excluded the murder conviction, but ruled that the other two convictions would be admissible should Provenzano testify. Consequently, Provenzano declined to testify.[22]

Provenzano argues that the district court erred by applying only rule 609(a)(2), without employing the balancing test of subdivision (a)(1), to the crimes of extortion and of conspiracy in a kickback scheme, both of which Provenzano claims do not "involve [] dishonesty or false statement," as required under subdivision (a)(2). The Government, on the other hand, argues, first, that the district court applied the balancing test of subdivision (a)(1), and, second, that the two convictions fall under subdivision (a)(2) in any event.

The district judge said three things about the two convictions he ruled admissible. First:

> I would say this: That under 609(a)(2) since the extortion of the Dorn Transportation Company, the Hobbs Act conviction, in my opinion, involved dishonesty. I would have to allow it since it's within a ten-year period. Extortion is dishonesty. You can't get around that I don't think.
>
> With respect to the Second Circuit decision, that also involves dishonesty as it's described to me.

(A3463). Second:

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22. Provenzano's failure to risk admission of the prior convictions by actually testifying does not prevent him from raising the issue now on appeal. *See, e.g., United States v. Cavender*, 578 F.2d 528 (4th Cir. 1978) (reviewing judgment without discussing issue); *United States v. Smith*, 551 F.2d 348 (D.C. Cir. 1976) (same).

> In my judgment extortion or conspiracy to take a kickback for a loan involved elements of dishonesty that are highly relevant to credibility.

(A3466). Third:

> In my opinion those are significantly relevant to the credibility. I'd like them in. If I had the discretion to do it I would keep out the murder case. That's a crime of violence, it's not directly related to the issue of credibility. And I think we'd be in a very difficult legal situation if shortly on the eve of Mr. Provenzano's conviction in this court next week sometime that murder conviction were to be reversed.

(A3467). Thus, even if the district court initially ruled the two prior convictions admissible automatically under subdivision (a)(2), it is clear that he later found as well specifically that they were "highly relevant" and "significantly relevant" to the credibility of Provenzano. Therefore, even though the district court never explicitly mentioned subdivision (a)(1), we affirm the ruling of admissibility under that subdivision, since the district court implicitly found that the probative value exceeded the prejudicial effect.[23]

---

23. We therefore decline to decide whether the two convictions could properly have been admitted under subdivision (a)(2). Nor need we address the unresolved question whether Fed. R. Evid. 403 and its balancing test of probative value versus potential prejudice limit the seemingly absolute admissibility conferred by rule 609(a)(2). *See United States v. Smith*, 551 F.2d at 350 n.20. The balancing test of rule 403 was implicitly applied under rule 609(a)(1) to admit the testimony: in light of the determination that the evidence was "highly relevant" or "significantly relevant," it was not an abuse of discretion not to exclude the testimony under rule 403.

Finally, *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968), does not mandate reversal. While the *Gordon* court did say that it is unfortunate when the

[footnote continued on following page]

C. *Thomas Andretta Issues*

1. *Evidence of Thomas Andretta's Incarceration*

Over Thomas Andretta's objection, in order to show that FLT was a sham corporation, the Government was allowed to prove that Thomas Andretta, who was supposed to be running FLT, was in jail at all relevant times. The district judge told the jury:

> Ladies and gentlemen, it is not disputed that Mr. Thomas Andretta was incarcerated between July 10, 1973 and April 11, 1975. The fact of that incarceration is being made known for a limited purpose to support the government's assertion that Mr. Thomas Andretta was not available to participate in the running of a trucking company which the government claims he incorporated while incarcerated. That is the only purpose for which this evidence is being admitted.
>
> You're not to speculate on the reasons for that incarceration, the place of it or anything else. You are also to draw no inferences because of this — because if this incarceration or the speculative reasons for it; Mr. Thomas Andretta is a bad man or disreputable individual or is any more likely than one who had not had this history to commit that crime. It's a limited purpose and I restricted the use of that evidence to that limited purpose.

(A1174). Thomas Andretta claims that this fact — incarceration — should have been excluded as too prejudicial, under Fed. R. Evid. 403, since he was willing to stipulate that he was unavailable, in any language that

---

fear of admission of prior convictions deprives the factfinder of a witness' testimony, *see* 383 F.2d at 940, the court clearly sanctioned admission of such prior convictions where the key issue is, as it is here, the credibility of the accused versus that of the accuser, *id.* at 941.

would satisfy the interest of the Government, so long as there was no mention of incarceration (A937-38).

An offer to stipulate does not automatically mean that the fact may not be proved instead, as long as the probative value of the proof still exceeds the prejudicial effect, taking into account the offer to stipulate. *United States v. Grassi*, 602 F.2d 1192, 1197 (5th Cir. 1979) ("A cold stipulation can deprive a party of the legitimate moral force of his evidence,' 9 Wigmore on Evidence § 2591 at 589 (3d ed. 1940), and can never fully substitute for tangible, physical evidence or the testimony of witnesses."); *accord, United States v. Caldwell*, 543 F.2d 1333, 1359 n.134 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976). Particularly in point is *United States v. Campisi*, 306 F.2d 308 (2d Cir.), *cert. denied*, 371 U.S. 920, 925 (1962):

> In order to prove the offense charged the government was required to establish that the bonds which were forged had been stolen, although it was not necessary to connect the defendants directly with the thefts. The appellants were willing to concede that the bonds were stolen, presumably in order to keep from the jury evidence of violent thefts which they thought might prejudice the jury against them on other issues. The government expressed its willingness to enter into a stipulation of this general nature, but the parties were not able to agree on the exact language. Campisi contends that the government was obligated to enter the stipulation and that it arbitrarily refused to do so with the result that much prejudicial evidence was needlessly paraded before the jury. A reading of the relevant portions of the transcript leaves much doubt that it

> was the government that refused to stipulate, but in any event the government had the right to present evidence that the bonds were stolen in the way it wished to present such evidence, not as appellants would have chosen to do so.

306 F.2d at 312. Thomas Andretta was not willing to stipulate to the ultimate fact that FLT was a sham corporation. The inference that must be drawn is that he hoped that the stipulation he accepted would still leave some doubt in the jury's view as to the full extent of his unavailability, such as the possibility that he was on a long vacation or business trip but was always free to come back if an emergency developed or if he so chose. Only by proving incarceration could the Government show Thomas Andretta's total unavailability as a principal officer, tending to prove that FLT was a sham. Moreover, the judge explicitly told the jury not to consider why Thomas Andretta was in jail, rather just to use that fact to prove that FLT must have been a sham because its ostensible chief officer could not have engaged in that role. This distinguishes this case from *United States v. Cook*, 538 F.2d 1000, 1005 (3d Cir. 1976) (abuse of discretion, where evidence of prior crime is called for, to introduce as well evidence of the *nature* of the prior felony).

In light of the failure of Thomas Andretta to offer a suitable stipulation and the conceptual difficulty of structuring a stipulation that would convey the same fact of unavailability due to incarceration without adverting to that concept, we conclude that there was no abuse of discretion in admitting the fact of Thomas Andretta's incarceration, especially with the limiting instruction the court gave.

2. *Disqualification of Thomas Andretta's Counsel*

The district court ruled that Robert Eisenberg, Esq. could not represent Thomas Andretta because Eisenberg had represented Picardo on Picardo's murder conviction. Therefore, Eisenberg would be in a conflict of interest situation between the duty of vigorous representation of Thomas Andretta and the duty of loyalty to Picardo, since confidences relating to Picardo's murder conviction and events of that period would be useful to impeach him as a witness against Thomas Andretta.

Thomas Andretta has stated that he was willing to waive effective representation, as the price for retaining Eisenberg. Nevertheless, there is no absolute right to particular counsel where there is an actual conflict of interest, *United States v. Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978). *Dolan* found actual conflict of interest where, *inter alia*, the defendant's attorney "could not effectively cross-examine his former client. . . — now an important prosecution witness — without intruding into matters protected by the attorney-client privilege," *id.* at 1184. We held that in such a situation, the district court could — as it did in the present case — "exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation" and refuse to accept the defendant's waiver of his right to effective assistance of counsel. *Id.* In the present case, although the district judge did not make explicit findings that Eisenberg knew specific facts that would have involved him in conflict, the district court correctly concluded that he must assume as much, since he could not actually inquire about the matter without thereby himself destroying the confidence (A319-21, A3503-05). Eisenberg's access to privileged information is conclusively presumed. *See*,

e.g., United States v. Kitchin, 592 F.2d 900, 904 (5th Cir. 1979) (per curiam) (adopting district court's findings and conclusions), *cert. denied*, 48 U.S.L.W. 3219 (U.S. Oct. 1, 1979); *cf. American Roller Co. v. Budinger*, 513 F.2d 982, 984 (3d Cir. 1975) (civil case); *Arkansas v. Dean Foods Products Co.*, 605 F.2d 380, 384-85 (8th Cir. 1979) (antitrust case). This court has held that counsel could be disqualified in a private antitrust suit because of confidences presumed from an ongoing attorney-client relationship as long as prior work could be turned over to new counsel, *IBM Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978). This case is no different.[24] Because Picardo's dealings at the time of his murder conviction bore so heavily on this case, it was clear that he could not be cross-examined without going into that sensitive period; therefore, the district judge properly disqualified Eisenberg.

In addition, there was testimony that Eisenberg had himself been involved in incorporating FLT (A1193-93). The district court judge, in ruling that Eisenberg was disqualified, specifically mentioned that Eisenberg's "prior representation with respect to FLT and Lift-Van and Picardo" (A321) were substantial factors in its ruling, whether or not Eisenberg was called at trial as a witness. *Cf. Commonwealth v. Duffy*, 483 Pa. 170, 394 A.2d 965 (1978) (counsel cannot be impartial where he knew prosecution witness would claim that counsel would receive stolen guns from defendant as payment for legal services and thus had a personal stake in defendant's acquittal).

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24. In the present case, Eisenberg was not prohibited from consulting with new counsel on factual background.

D. *Stephen Andretta Issue: Immunized Testimony*

Stephen Andretta was immunized before a grand jury in the Eastern District of Michigan on December 10, 1975 and was compelled to testify. The questions he answered there bear on the same subject matter as does the present case.

In the present case, Stephen Andretta requested a taint hearing, at which the Government would have had to demonstrate that its evidence was not the fruit of the grand jury testimony.[25] The district court refused, holding that a review of the Government's documentary evidence revealed that as of a prior date it already had all the information Stephen Andretta later disclosed in Michigan (A356-58). The issue facing us is whether the district court's finding that the Government carried its "heavy" burden of showing lack of taint, based on the Government's documentary evidence submitted at trial, reproduced in the Government's Supplementary Appendix, is clearly erroneous. *See United States v. Romano*, 583 F.2d 1, 7 (1st Cir. 1978); *United States v. Jones*, 542 F.2d 186, 199 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976).

In the present case, although no hearing was held, the Government's position is that none was needed because the issue was correctly resolved on the documents submitted. *Romano* relied partially on documents, *see* 583 F.2d at 8, although it stated that a hearing normally is held, *id.* at 7; *accord, United States v. Nemes*, 555 F.2d 51, 54-55 (2d Cir. 1977); *United States v. Bianco*, 534 F.2d 501, 508-11 (2d Cir.), *cert. denied*, 429 U.S. 822 (1976). If the Government's documents conclusively demonstrate prior knowledge, we know of no reason

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25. Such evidence cannot be used. *Kastigar v. United States*, 406 U.S. 441 (1972).

why a hearing must be held.[26] We have examined the record and the individual claims of taint. We conclude that the district court correctly found that Government documents dated before the start of Stephen Andretta's Michigan testimony clearly show prior knowledge of all the meager information Stephen Andretta supplied in Michigan. Aside from *pro forma* and unnecessary testimony of the authors of the documents concerning their authenticity, nothing could have been added by holding a hearing. Therefore, we need not reverse Stephen Andretta's conviction or even remand for an evidentiary hearing.

III.

We conclude that the district court did not commit reversible error in any of its trial rulings. Nor did the district court err in denying the new trial motions. Thus, we are satisfied that all three appellants, Anthony Provenzano, Thomas Andretta, and Stephen Andretta, received fair trials. We will therefore affirm all three judgments of sentence.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals
for the Third Circuit

---

26. *United States v. De Diego*, 511 F.2d 818, 822 & n.4 (D.C. Cir. 1975), merely states the converse: that the indictment cannot be dismissed without giving the Government the opportunity to show at a hearing that there is no taint.

Appendix B
Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 79-1912/79-1913, 79-1956, 79-2381 and 79-2387
UNITED STATES OF AMERICA
vs.
PROVENZANO, ANTHONY,
Appellant in Nos. 79-1912 and 79-2381
ANDRETTA, THOMAS,
Appellant in Nos. 79-1913 and 79-2387
ANDRETTA, STEPHEN,
Appellant in No. 79-1956
(D.C. Crim. Nos. 79-00072-01-02 and 03)
ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Present: ROSENN, GARTH and SLOVITER,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on March 25, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed July 11, 1979 and appealed at our No. 79-1912; filed September 21, 1979 appealed at our No. 79-2381; filed July 11, 1979 appealed at our No. 79-1913; filed September 21, 1979 appealed at our No. 79-2387; and filed July 11, 1979 appealed at our No. 79-1956, be, and the same are hereby affirmed, all in accordance with the opinion of this Court.

Appendix B

Judgment of United States Court of Appeals

ATTEST:

/s/ _____

THOMAS F. QUINN
Clerk

May 8, 1980

Certified as a true copy and issued in lieu of a formal mandate as to Nos. 79-1912/13, 79-2381 & 79-2387 on June 30, 1980.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1956

Re: United States of America

vs.

Andretta, Stephen,

Appellant.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 20, 1980.

/s/ _____

LEONARD I. GARTH, U.S.C.J.
Judge

Dated: July 2, 1980

Appendix C

Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 79-1912, 79-2381, 79-1956, 79-1913 and 79-2387
UNITED STATES OF AMERICA,

Appellee

v.

ANTHONY PROVENZANO, STEPHEN ANDRETTA, and THOMAS ANDRETTA,

Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER,
Circuit Judges.

The petition for rehearing filed by
Anthony Provenzano, Stephen Andretta,
and Thomas Andretta, Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ _____

LEONARD I. GARTH
Judge

Dated: June 20, 1980

Appendix D

Constitutional and Statutory Provisions Involved in the Case

CONSTITUTION OF THE UNITED STATES

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix D

Constitutional and Statutory Provisions Involved in the Case

STATUTORY PROVISIONS

18 U.S.C. § 1961

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code; Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to

interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of

Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 941.

§ 1962. PROHIBITED ACTIVITIES

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities

of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.

§ 1963. CRIMINAL PENALTIES

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.

Supreme Court, U. S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

No. 80-78

In the Supreme Court of the United States

OCTOBER TERM, 1979

ANTHONY PROVENZANO, STEPHEN ANDRETTA AND THOMAS ANDRETTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 80-78

ANTHONY PROVENZANO, STEPHEN ANDRETTA AND THOMAS ANDRETTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the jury selection procedures employed by the district court deprived petitioners of a fair trial.

2. Whether the district court properly denied petitioners Thomas and Stephen Andretta's motions for severance and change of venue.

3. Whether the district court abused its discretion in dealing with an incident of juror misconduct.

4. Whether petitioners were deprived of their right to be present at trial by their absence from a conference between their attorneys and the court concerning the juror misconduct incident.

5. Whether the court of appeals properly upheld the admission of certain evidence on a ground that the district court did not consider.

6. Whether 18 U.S.C. 1962(c), which prohibits participation in "any enterprise" conducted through a pattern of racketeering activity, and affecting interstate commerce, reaches participation in illicit ventures, as well as participation in legitimate businesses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 620 F.2d 985.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a-43a) was entered on May 8, 1980. A petition for rehearing was denied on June 20, 1980 (Pet. App. 44a). The petition for a writ of certiorari was filed on July 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of participating in the affairs of an enterprise conducted through a pattern of racketeering activity,[1] in violation of 18 U.S.C. 1962(c), and of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d). Petitioners Provenzano and Thomas Andretta were each sentenced to 20 years' imprisonment and fined $20,000. Petitioner Stephen Andretta was sentenced to 10 years' imprisonment and fined $15,000. The court of appeals affirmed (Pet. App. 1a-41a).

The evidence at trial, the sufficiency of which petitioners do not challenge, established that petitioners, through their control of a Teamsters Union local,

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[1]The acts of racketeering consisted of unlawful payments to labor union employees or officers, in violation of 29 U.S.C. 186. See 18 U.S.C. 1961(1)(C).

conspired to obtain illegal payments from trucking companies in return for supplying "labor peace" (see Pet. App. 3a–7a). The target companies, Interocean Services, Inc. and its successor, Di-Jub Leasing Corporation, were "in house" truckers for Seatrain Lines, Inc., a steamship company engaged in shipping containerized freight that was ultimately transported by truck to its final destination.

In early 1970, co-conspirator Ralph Picardo, who operated a trucking firm (Cargo Truck Leasing), negotiated an agreement with Raymond Rosen, Interocean's vice president, to provide trucks and owner-operator drivers to Interocean, thus enabling Interocean to reduce its operating costs substantially by avoiding payment of union wages and benefits to its drivers. In addition, Picardo told Rosen that, through his associates, he could guarantee that no efforts would be made to organize Interocean's drivers, and that Interocean's operations would not be interrupted by labor disputes and would be protected from molestation by other Teamster locals and other unions in the ten states in which Interocean operated (J. App. 999–1004, 1029).[2] Petitioners, through their influence at Local 560 of the International Brotherhood of Teamsters, located in Union City, New Jersey,[3] were

[2] "J. App." refers to the five volume joint appendix in the court of appeals; "J.S. App." refers to the one volume joint supplemental appendix in that court.

[3] During the conspiratorial period, petitioner Provenzano allegedly controlled Local 560 and other locals; between approximately December 1975 and June 1978, Provenzano was the Secretary-Treasurer of Local 560. During the same period, petitioner Stephen Andretta was a business agent and employee of Local 560 (J. App. 954, 960–961, 978–984).

able to ensure Cargo (and, hence, Interocean) an adequate supply of drivers. In return, Picardo received monetary payments through a "ghosting" scheme in which Interocean paid Cargo for fictitious drivers; these payments were divided among petitioners and other co-conspirators (Pet. App. 5a–6a).[4]

The payments generated by the scheme were distributed through various devices (Pet. App. 6a; J. App. 1069–1072, 1146–1147). On at least one occasion Picardo personally delivered cash proceeds of the scheme to petitioner Provenzano and at his direction also used some of the proceeds to pay for the upkeep on horses for Provenzano's daughter (J. App. 1073, 1120–1123, 1297–1298, 1323). Picardo also personally delivered the proceeds to the other petitioners (J. App. 1073–1074, 1090–1092). Moreover, Picardo told petitioner Provenzano "exactly * * * the method [he was] using" to obtain the payments, and Provenzano "complimented" him on the scheme's success (J. App. 1072–1073).

In order to obtain greater profits, petitioners acquired control of Lift-Van Transport, a licensed interstate common carrier, in an attempt to replace Interocean as Seatrain's in-house shipper (Pet. App. 7a; J. App. 1144, 1148). Picardo was the ostensible purchaser of Lift-Van; petitioners in fact contributed to its purchase as silent partners (J. App. 1169–1172,

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[4]Petitioners required Interocean to increase its payments in return for preventing the International Longshoremen's Association from claiming jurisdiction over the movement of trucks in and around Seatrain's pier facilities (Pet. App. 6a; J. App. 1058, 1060–1061).

1176). Lift-Van's Teamsters contract was not renewed after petitioner Stephen Andretta warned officials of the Teamsters local that petitioners' group controlled the company (J. App. 1175–1178). However, Lift-Van did not succeed in its attempt to replace Interocean (J. App. 1220–1223, 2517).

Thereafter, petitioners formed FLT Trucking and Leasing, Inc., which replaced Cargo Truck Leasing as the conduit for the payments from Interocean for the fictitious drivers. Petitioner Thomas Andretta, who was in prison at all relevant times, ostensibly ran FLT (Pet. App. 7a; J. App. 1198–1211, 2193–2194, 2197–2199).

The scheme was uncovered when Picardo agreed to cooperate with the government (Pet. App. 7a).

ARGUMENT

1. During the district court's voir dire of the jury panel, a number of prospective jurors stated that they had some acquaintance with pretrial publicity surrounding the case. Most of that publicity focused on petitioner Provenzano. Petitioners contend (Pet. 19–30) that the district court failed adequately to question the jurors concerning the effect of the pretrial publicity upon their ability to remain impartial and improperly refused to excuse five prospective jurors, only three of whom were challenged for cause. These contentions are without merit.

It is well settled that a defendant is not entitled to a trial by a body of jurors ignorant of all facts surrounding the case, a standard that would be impossible to achieve in many instances. Rather the defendant is

entitled to be tried before an impartial jury that will render a verdict based soley on the evidence presented in court. *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961). No court has ever held that the only impartial jury is a jury completely ignorant of the facts surrounding a case. See *Dobbert* v. *Florida*, 432 U.S. 282, 301-302 (1977). As this Court emphasized in *Irvin* v. *Dowd*, *supra*, 366 U.S. at 722-723: "In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public * * * and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases." The Court added that "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723.

The district court is vested with broad discretion over the questioning of prospective jurors. Fed. R. Crim. P. 24(a); *Ristaino* v. *Ross*, 424 U.S. 589, 594 (1976); *Hamling* v. *United States*, 418 U.S. 87, 139-140 (1974); *Ham* v. *South Carolina*, 409 U.S. 524, 527-528 (1973). And "because the 'determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge'" (*Ristaino* v. *Ross*, *supra*, 424 U.S. at 594-595), his decision that a juror is impartial "will be reversed only for a manifest abuse of discretion." *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914, 934 (3d Cir. 1974), cert. denied, 424 U.S. 917 (1976); *United States* v. *Gullion*, 575 F.2d 26, 29 (1st Cir. 1978); *United States* v. *Ploof*, 464 F.2d 116, 118 n.4 (2d Cir. 1972).

a. The district court in this case commenced the jury selection process by questioning the panel of 62 prospective jurors in open court on general matters (J. App. 465–502, 552–580, 626–665, 757–773). This was followed by individual questioning of each panel member in chambers regarding exposure to pretrial publicity and each juror's ability to render an impartial verdict (J. App. 504–545, 580–622, 665–744, 774–789); defense counsel participated in this questioning (J. App. 507–508, 511, 514, 517–519, 522–523, 525, 526–527, 530–532, 534, 537–538, 583, 587, 591–592, 595, 597, 601–604, 605–607, 611, 616, 619, 671–673, 677, 680, 682, 692–693, 695–696, 704, 709, 711–712, 718–721, 726–727, 732–733, 736–738, 740, 743–744, 780–782, 786–787, 789). The questions focused on the nature of the information each juror had heard and the amount of detail he or she was able to recall. In addition, the court on numerous occasions inquired whether prospective jurors had discussed among themselves news coverage concerning petitioner Provenzano (J. App. 519, 522, 531, 534, 589, 592, 595, 597, 600, 611, 615–616, 621–622, 673, 692, 713, 720–721, 737, 738, 741, 774, 783, 789).

In determining whether to excuse particular jurors for cause, the court considered the nature of each juror's answers, as well as the juror's demeanor when asserting an ability to decide the case fairly solely on the evidence. Upon considering all of these factors, the district court excused for cause, either sua sponte or on defense challenge, all prospective jurors who had heard of petitioner Provenzano's murder conviction, as well as six jurors (Nos. 25, 34, 43, 45, 51, 55) who had not. Of the jurors who were excused for cause, five

(Nos. 25, 34, 40, 43 and 55) were excused notwithstanding their statements that they were able to disregard what they had read or heard.

Petitioners to the contrary notwithstanding (Pet. 29–30), this record demonstrates not an abuse of the district court's broad discretion over the jury selection process, but an assiduous regard for the rights of the parties to judgment by an impartial panel. After careful and particularized consideration, the court retained only those prospective jurors who satisfactorily demonstrated their impartiality. In these circumstances, "the procedures followed and the questions asked were sufficient to ensure selection of a fair and impartial jury." *United States* v. *Johnson*, 584 F.2d 148, 157 (6th Cir. 1978), cert. denied, 440 U.S. 918 (1979). See *United States* v. *Capo*, 595 F.2d 1086, 1090–1093 (5th Cir. 1979), cert. denied *sub nom. Lukefahr* v. *United States*, No. 79–391 (Jan. 7, 1980).

b. What has been said rebuts in large measure petitioners' further claim (Pet. 21–28) that the district court erred in refusing to strike for cause several jurors who had been exposed to some media coverage about petitioner Provenzano but had assured the court to its satisfaction that they would be impartial. To begin with, as the court of appeals noted (Pet. App. 19a n.15), petitioners waived any objection with respect to two of the veniremen (Nos. 11 and 59), whom petitioners failed to challenge for cause. See *United States* v. *Cepeda Penes*, 577 F.2d 754, 759 (1st Cir. 1978); *United States* v. *Hawkins*, 566 F.2d 1006, 1013 (5th Cir.), cert. denied, 439 U.S. 848 (1978); *United States* v. *Ragland*, 375 F.2d 471 (2d Cir. 1967); *Fabian* v. *United States*, 358 F.2d 187 (8th Cir. 1966).

Moreover, the record clearly supports the district court's findings of impartiality concerning the three challenged jurors whom the district court refused to excuse for cause. See J. App. 519–523, 532–534, 588–591. None of these jurors had heard anything specific about the case (compare *United States ex rel. Doggett* v. *Yeager*, 472 F.2d 229 (3d Cir. 1973)), or had learned about any inadmissible evidence. Nor were these jurors exposed to information about petitioners' past crimes. Compare *Marshall* v. *United States*, 360 U.S. 310 (1959). The three jurors had been exposed to news reports that described petitioner Provenzano in general terms as a "gangster," as having "organized crime" connections, or as involved in "kickbacks into unions." However, as the court of appeals observed (Pet. App. 19a), "[n]o panel member indicated any belief in this type of generalized innuendo, and each assured the district judge in response to a series of five to ten searching questions that he or she would decide the case strictly on the evidence and on the law as explained by the judge and would not be influenced by publicity." The court of appeals correctly concluded, therefore, that the district court's refusal to excuse these jurors for cause was not reversible error.

2. Petitioners Thomas and Stephen Andretta contend (Pet. 30–32) that they were tainted by the publicity concerning petitioner Provenzano and that the district court abused its discretion in denying their motions for a severance and change of venue.[5] We disagree.

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[5] Petitioners presented these motions for the first time during the jury selection process (J. App. 722–723, 791).

On the facts of this case, the trial judge did not abuse his discretion by denying petitioners' motions and by proceeding to determine if an unbiased jury panel could be selected through customary voir dire procedures. See, *e.g.*, *United States* v. *Capo*, *supra*; *United States* v. *Gullion*, *supra*, 575 F.2d at 28; *United States* v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *Jones*, 542 F.2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976); *Pamplin* v. *Mason*, 364 F.2d 1, 6 n.9 (5th Cir. 1966). As the District of Columbia Circuit observed in *United States* v. *Haldeman*, *supra*, 559 F.2d at 63 (emphasis omitted), "if an impartial jury actually cannot be selected, that fact should become evident at the voir dire." See also *Dobbert* v. *Florida*, *supra*, 432 U.S. at 301-303, rejecting the contention that the "quantum of publicity" surrounding the defendant's offense made it impossible to select a fair and impartial jury. The district court had every reason to believe that the procedures it adopted would ensure the selection of an impartial jury, and, as we have shown, the record confirms that the jury as selected was impartial.

3. The jury in this case was sequestered. Toward the end of the trial, a marshal discovered a juror and two alternate jurors smoking a marijuana cigarette. The marijuana incident was reported to the district judge, who related the incident to counsel and stated that he did not think the jurors' behavior warranted their removal. The judge, however, solicited counsel's opinions concerning an appropriate course of action. After conferring among themselves, defense counsel agreed that the jurors should not be removed; counsel

suggested in addition that the court inform the jurors that they would not be prosecuted (Pet. App. 19a-20a). Counsel's suggestion was intended to eliminate any possibility that the jurors "might be inclined to favor the Government out of fear of prosecution on charges relating to the marijuana incident" (J.S. App. 117-118; see also J.S. App. 9, 11, 16-17, 38-42). The court followed defense counsel's request (J.S. App. 17).

Petitioners now argue (Pet. 32-35) that the district court should have disregarded defense counsel's advice and dismissed the offending jurors sua sponte. This argument is not well taken. As the court of appeals ruled (Pet. App. 20a) in rejecting this claim, there is no reason in this case "to depart from the longstanding rule that counsel's intentional tactical decisions at trial bind his client."[6] See *Wainwright* v. *Sykes*, 433 U.S. 72, 91 n.14 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976); *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). Inasmuch as the district court followed the path the defense laid out for it, any error in its handling of this episode was invited and accordingly affords petitioners no basis to seek reversal of their convictions. See *United States* v. *Renfro*, 620 F.2d 569, 577 (6th Cir. 1980), petition for cert. pending, No. 80-5192 (filed Aug. 11, 1980); *United States* v. *Witt*, 215 F.2d 580, 584-585 (2d Cir.), cert. denied, 348 U.S. 887 (1954).

[6] It is undisputed that defense counsel's decision not to request removal of the regular juror was a deliberate tactical choice. During their discussions concerning the incident one defense attorney stated that he did not wish to challenge the juror because the first alternate appeared to him to be pro-government (J.S. App. 41; see Pet. App. 23a n.18).

At all events, there was no error in permitting the juror and alternates to remain. A "criminal trial does not unfold like a play with actors following a script * * *. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process." *Geders* v. *United States*, 425 U.S. 80, 86 (1976). Nowhere is the court given broader discretion than in dealing with allegations of juror misconduct, for the trial judge alone has first-hand knowledge of the jury's demeanor. See *United States* v. *Barnes*, 604 F.2d 121, 144 (2d Cir. 1979), cert. denied, No. 79-261 (Apr. 21, 1980); *United States* v. *Bufalino*, 576 F.2d 446, 451-452 (2d Cir.), cert. denied, 439 U.S. 928 (1978); *United States* v. *Hendrix*, 549 F.2d 1225, 1227-1229 (9th Cir. 1977); *United States* v. *Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977).

Here, there is no reason to believe that the jurors' consumption of marijuana "affected [their] ability to hear evidence or to deliberate" (Pet. App. 21a). Following the incident, no one on the defense team complained that the perception of the juror and alternates involved in the incident seemed impaired (J.S. App. 58-59). Subsequently, in denying a motion for a new trial based upon this incident, the district court found that there was no basis to suggest that "the sharing of a marijuana cigarette by" the regular juror "in any way impaired that juror's ability to continue functioning as a juror" (J.S. App. 117). In the absence of any showing of prejudice, it is apparent that the district court acted well within its discretion in not removing the juror and alternates. See *United States* v.

Taliaferro, 558 F.2d 724, 725–726 (4th Cir. 1977), cert. denied, 434 U.S. 1016 (1978).[7]

4. Petitioners also contend (Pet. 36–39) that their absence from the conference concerning the marijuana incident violated their rights under the Constitution and Fed. R. Crim. P. 43(a) to be present at trial. The court of appeals correctly rejected this contention (Pet. App. 22a–24a).

The conference concerning the jurors' misconduct involved an issue of law and did not concern matters relevant to guilt or innocence. Moreover, although the district court admonished counsel not to disclose the marijuana incident to the press (J.S. App. 39, 41), defense counsel were free to consult with petitioners and solicit their advice during this and other conferences (J. App. 1023–1025). In these circumstances, petitioners' physical absence from the conference bore no rela-

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[7]There is no basis for petitioners' suggestion (Pet. 33) that the district court permitted jurors "to violate the law by smoking marijuana." By declining to discharge the juror and alternates, the court neither approved nor condoned their conduct. Nor may petitioners now claim that the jurors' impartiality was undermined by the court's assurance that they need not worry about prosecution. As the court of appeals pointed out (Pet. App. 22a), "it was defense counsel who insisted on the judge's assuring the jurors that they would not be prosecuted *lest* they favor the Government out of fear of prosecution." Finally, in view of the unusual circumstances presented here, this case does not present an appropriate occasion for this Court to review the court of appeals' failure to reverse petitioners' convictions under its supervisory powers. We doubt that similar incidents of juror misconduct are likely to arise with any frequency, and unless they do we submit that the determination of the proper means of handling such situations is best left to the discretion of the district courts on a case by case basis, subject to review by the courts of appeals.

tion to their "opportunity to defend against the charge" (*Snyder* v. *Massachusetts*, 291 U.S. 97, 105-106 (1934)) and did not deprive them of their Sixth Amendment right to be present at the trial. See *United States* v. *Brown*, 571 F.2d 980, 986-987 (6th Cir. 1978); *United States* v. *Howell*, 514 F.2d 710, 714 (5th Cir.), cert. denied, 423 U.S 914 (1975); *United States* v. *Baca*, 494 F.2d 424, 428 (10th Cir. 1974); *Ellis* v. *Oklahoma*, 430 F.2d 1352, 1354-1356 (10th Cir. 1970), cert. denied, 401 U.S. 1010 (1971).[8]

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[8]The cases relied upon by petitioners (Pet. 37) are inapposite.

In *Nevels* v. *Parratt*, 596 F.2d 344 (8th Cir. 1979), a juror allegedly informed a third party during the trial that he did not think the state had proven its case against the defendant. The defendant was not present during the hearing in chambers at which the juror and the person to whom he had spoken were questioned concerning the incident. Because the hearing concerned a factual inquiry into a matter that was directly related to a "decision about the defendant's guilt" (596 F.2d at 346), the court of appeals agreed that the defendant had a right to be present at the hearing. The court held, however, that the error was harmless beyond a reasonable doubt and affirmed the denial of the defendant's petition for a writ of habeas corpus.

In *Blackwell* v. *Brewer*, 562 F.2d 596 (8th Cir. 1977), the defendant was not present at a hearing where the court questioned deputy sheriffs, bailiffs, and members of the jury to determine whether any jurors had been prejudiced by an altercation between the defendant's supporters and sheriff's personnel in the courtroom hallway in the presence of some jury members. Some of the jurors stated that the incident had frightened them. The court of appeals observed that "[the defendant's] exclusion from the courtroom may very well have led some of the jurors to suspect that [the defendant] himself bore some responsibility for the altercation. The trial judge made no attempt to disabuse the jurors of such a possible inference." *Id.* at 600. While the court expressly found "no constitutional error in the court's in-chambers investigation of the melee" (*id.* at 600 n.3), it concluded that the prejudice to the defendant from his absence was not harmless because it prevented him from consulting with his

Furthermore, assuming arguendo that petitioners were entitled, under Fed. R. Crim. P. 43, to be present at the conference, defense counsel's failure to object to proceeding in petitioners' absence constituted a waiver of that right. See *United States* v. *Brown*, *supra*, 571 F.2d at 987; *United States* v. *Sinclair*, 438 F.2d 50, 52 (5th Cir. 1971); *Cox* v. *United States*, 309 F.2d 614, 616–618 (8th Cir. 1962). At all events, any error arising from petitioners' absence was plainly harmless. See *United States* v. *Brown*, *supra*; *United States* v. *Baca*, *supra*, 494 F.2d at 428–429. As the court of appeals observed (Pet. App. 23a–24a):

> Examination of the record reveals that counsel vigorously safeguarded [petitioners'] interests, to the extent of insisting on procedures they—counsel—thought would yield the best chance for

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attorney with respect to whether any of the jurors had formed the impression that the defendant himself had precipitated the altercation. *Id.* at 600. Accordingly, the court remanded the case to determine whether the defendant had waived his right to object to the court's error.

In *Near* v. *Cunningham*, 313 F.2d 929 (4th Cir. 1963), the court remanded for a hearing to determine whether the defendant had been present at a conference when a decision was made that the jury would not be sequestered. The court stated (313 F.2d at 932) that relief was not warranted on "the mere fact of the prisoner's absence from the conference" but rather that relief would be warranted by that fact "combined with the allegations" that as a result of the court's decision the jury was exposed to highly prejudicial remarks by spectators during court recesses.

Finally, in *Bunch* v. *Maryland*, 281 Md. 680, 381 A.2d 1142 (1978), and *Commonwealth* v. *Robichaud*, 358 Mass. 300, 264 N.E.2d 374 (1970), also cited by petitioners, the courts concluded that under applicable provisions of state law the defendants were entitled to be present at proceedings concerning juror misconduct.

> acquittal. It is fanciful for [petitioners] to suggest *post hoc* that they would have demanded replacement of the offending juror had they been present at the conference.

5. Petitioners contend (Pet. 40–42) that the court of appeals' affirmance of an evidentiary ruling by the district court on an alternative ground not presented at trial violates due process. This contention is without merit.

Three witnesses, Paulette Compton, Mary Hart, and Alan Abramowitz, testified for the government that Picardo had told them about his involvement with petitioner Provenzano in the illegal "ghosting" scheme. The district court admitted this testimony pursuant to Fed. R. Evid. 801(d)(2)(E), as co-conspirator statements made in furtherance of the conspiracy. The court of appeals concluded (Pet. App. 29a) that Compton's testimony was properly admitted on that ground. With regard to the testimony of Hart and Abramowitz, however, the court stated that "[t]he district court made no findings, and the Government has pointed to no evidence indicating that anything Picardo told them could have furthered the conspiracy" (*id.* at 30a). Instead, the court of appeals affirmed the ruling on the alternative ground that the testimony concerning Picardo's statements made prior to Picardo's 1975 murder conviction was probative to rebut the defense claim "that Picardo was lying against all the defendants in return for benefits from the Government" (*ibid.*).

The defense at trial focused on Picardo's credibility, and, in particular, his motivation to testify falsely in order to obtain immunity with respect to the instant

charges and to secure the federal government's assistance in avoiding punishment for the murder conviction (J. App. 886–899, 918–919). During cross-examination of Picardo, counsel for petitioner Provenzano specifically raised the issue of Picardo's bias or motive (Pet. App. 31a n.20; J. App. 1506–1507). In these circumstances, we believe that the court of appeals was correct in concluding that the testimony in question was properly admitted to rebut the defense claim of recent fabrication. We note that petitioners do not contest this conclusion; they merely contend that the court of appeals' reliance upon it violates due process because they were denied the opportunity to contest the admissibility of the evidence on this ground.[9] Petitioners' claim rings hollow in view of their failure to make any substantive argument that the court of appeals was mistaken. Given this implicit concession that the evidence was admissible, the court of appeals' disposition deprived petitioners of nothing they otherwise might have achieved had the district court ruled the testimony admissible to rebut the recent fabrication charge. Plainly, the admission of indisputedly proper evidence does not offend due process. *United States* v. *Rosenstein*, 474 F.2d 705, 709–714 (2d Cir. 1973).[10]

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[9] We disagree with petitioners' claim (Pet. 41) that the government on appeal enjoys an advantage over a criminal defendant because it can suggest alternative grounds not raised at trial for the admissibility of evidence. On the contrary, the admission of evidence on behalf of a defendant is not subject to review on appeal at all.

[10] In any event, the testimony of Hart and Abramowitz was merely cumulative to Compton's testimony, which the court of appeals held (and petitioners do not dispute) was properly ad-

6. Petitioners contend (Pet. 43–51) that their convictions should be overturned because the definition of "enterprise" in the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1962–1964) ("RICO") should not be interpreted to include illicit ventures as well as legitimate businesses. In support of this contention, they rely upon the recent decision of the Sixth Circuit in *United States* v. *Sutton*, 605 F.2d 260 (1979), and assert that the decision below "appears" to conflict with the decision in *Sutton*. However, as we have informed the Court in response to petitions for writs of certiorari in several other cases in which this question was presented, the Sixth Circuit has granted the government's petition for rehearing en banc in *Sutton* and has vacated the panel's decision. Accordingly, there is at present no conflict among the circuits on this issue requiring resolution by this Court, since every other court of appeals to have passed upon the question has concluded that 18 U.S.C. 1962 reaches illegitimate as well as legitimate enterprises that are conducted through a pattern of racketeering acivity. *United States* v. *Aleman*, 609 F.2d 298 (7th Cir. 1979), cert. denied, No. 79–1009 (Mar. 24, 1980); *United States* v. *Rone*, 598 F.2d 564 (9th Cir. 1979), cert. denied *sub nom. Little* v. *United States*, No. 79–5013 (Mar. 24, 1980); *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v. *Elliott*, 571 F.2d 880, 896–899 (5th Cir.), cert. denied, 439 U.S. 953 (1978); *United States* v. *Altese*, 542 F.2d 104 (2d Cir. 1976), cert. de-

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mitted as co-conspirator statements. Any error in the admission of the testimony of Hart and Abramowitz was therefore harmless. *United States* v. *Rosenstein*, *supra*, 474 F.2d at 714.

nied, 429 U.S. 1039 (1977).[11] Moreover, for the reasons stated in our Brief in Opposition in *Little* v. *United States*, *supra*, we submit that Section 1962 reaches not only legitimate businesses or operations, but also informal associations of individuals engaged in illegal activities.[12]

Finally, even assuming that RICO seeks only to preclude corrupt infiltration of legitimate businesses as petitioners contend, reversal of their convictions would not be warranted. The enterprise that was charged in the instant indictment included several legitimate trucking companies (J. App. 19). In addition, as the court of appeals stated (Pet. App. 11a-12a):

> The purpose of RICO—prevention of infiltration of legitimate business by racketeers—would in any event be vindicated by the convictions here, since the wholly illegitimate Provenzano association subverted legitimate unions and businesses * * *.

[11] We note that the Eighth Circuit, in *United States* v. *Anderson*, No. 79-1809 (Aug. 7, 1980), slip op. 29, has recently concluded that Congress in enacting RICO intended the term "enterprise" to encompass only an association whose operations are directed toward an economic goal and whose existence can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity." Unlike the panel in *Sutton*, however, the court in *Anderson* did not rest its decision on the legitimacy or illegitimacy of the enterprise, "but rather on the need for a discrete economic association existing separately from the racketeering activity." Slip op. 30. As we show below (pages 18-19, *infra*), the enterprise here included several legitimate trucking companies, and the RICO statute was properly employed as the basis for prosecution in this case, which involved the infiltration of racketeers into an important segment of the nation's business economy.

[12] We are sending petitioners' counsel copies of our submissions in *Little*.

Thus even if there were presently a conflict in the circuits on this issue warranting this Court's review, this case would not be an appropriate one in which to resolve the question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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